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United States Circuit Court of Appeals

NINTH CIRCUIT.

FEBRUARY TERM, 1903.

BOISE CITY ARTESIAN HOT & COLD WATER COMPANY,
Plaintiff in Error.

vs.

BOISE CITY,
Defendant.

FILED
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STATEMENT OF THE CASE.

This case is in this Court upon a Writ of Error to the United States Circuit Court for the District of Idaho, to correct error of that Court in the record and proceedings and also in the final judgment on verdict of jury, rendered by direction of the Court, to the effect that plaintiff takes nothing by this action and that defendant recovers its cost herein.

Four specifications of error are assigned: two relate to

rejection of evidence; the third is that the Court erred in charging the jury to find for defendant; and the fourth is to the verdict as against law and not sustained by the evidence; but, practically, they each and all raise but *one question*, and that is the question presented on this hearing, and relates to whether or not the plaintiff corporation and its immediate predecessor were, by law, obliged to furnish the defendant city *water for street sprinkling purposes, free of charge,* at the times, in the manner, and under the conditions set forth in the complaint.

The defendant city bases its claim to such water *free* upon secs. 2710 and 2711 of the Revised Statutes of Idaho, 1887, which, as far as applicable, read:

"Sec. 2710. No corporation formed to supply any city or "town with water must do so unless previously authorized "by an ordinance of the authorities thereof, or unless it is "done in conformity with a contract entered into between "the city or town and the corporation. * * *

"Sec. 2711. All corporations formed to supply water to "cities or towns must furnish pure, fresh water to the inhab- "tants therefor for family use, so long as the supply permits, "at reasonable rates and without distinction of person upon "proper demand thereof; and must furnish water to the "extent of their means in case of fire and other great neces- "sity, free of charge."

The plaintiff claims:

First—That said statute is repealed by the Constitution of Idaho and by acts of the Legislature thereunder.

Second—That, whether repealed or not, it does not bind the plaintiff and did not its predecessor in interest in the water works for various reasons, one of which is that neither the plaintiff nor any of its said predecessors, except two certain persons, H. B. Eastman and B. M. Eastman, known as

the Eastman Brothers, ever received from the State or the city any grant, franchise, easement or license, but are operating and always did operate, in the laying of pipes and the furnishing of water, under and by virtue of a grant made, not to any corporation, but to said two individuals, and which was purchased by plaintiff and its said corporate predecessors.

Another of which is that it is not and was not within the "extent of the means" of the water company to furnish water to the extent demanded and taken for street sprinkling purposes.

Another of which is that, by the laws of the State, and by the charter of the city, water for street sprinkling is for a local benefit, or improvement, to be paid for by the owners of property abutting on streets sprinkled.

And another question relates to a large portion of the water which is demanded and taken and used by defendant, in sprinkling streets in blocks and portions of the city where the water is supplied to the inhabitants thereof, not by plaintiff, but by another person, an individual from whom no water for such, or any, street sprinkling purpose is demanded or is taken, but the plaintiff's water instead.

And another is that, on account of the nature of the waters, and especially of the hot artesian water, such a statute, as defendant relied on, has no application; and that such waters were not within the legislative intent in such statute; nor was it within legislative power to provide that for any such purpose such waters shall be furnished free of charge.

The water company having refused to furnish free water for such purpose and having forbidden the taking of its waters and having shut off the same from the city as far as able without shutting off water used for fire and other purposes,

the city took the water in manner set forth, which plaintiff claims was wrongful and a trespass. The city took the hot water as set forth in the complaint, also took cold water as set forth, and used them both for street sprinkling, as alleged. The main question here and the real contest between the plaintiff water company and the city is and has been as to whether the water company must furnish water for street sprinkling free of charge.

STATEMENT OF FACTS.

This is an action, sounding in tort, for the wrongful taking of plaintiff's and of its immediate predecessors' properties by the defendant.

Two causes of action are set forth in the complaint. The first is for damages for such taking, prior to the time when plaintiff became the owner and operator of said water works, and while its immediate predecessor owned and operated them, and which accrued to such predecessor, which assigned it to plaintiff. The second is for damages on account of such taking, suffered by plaintiff since it became the owner and operator of said water works. The causes of action are the same, except that one is on an assigned claim and the other is not.

The facts set forth in the complaint are nearly all admitted by the answer, although the answer attempts to deny most of them.

That plaintiff is a corporation of the State of West Vir-

ginia is shown by its certificate of incorporation. (Trans. p. 93.)

That plaintiff is, as alleged, acting as such corporation in Ada County, Idaho, and carrying on and operating said water works is shown by the testimony of B. S. Howe. (Trans. p. 88.)

That plaintiff is the owner of the water works properties and of the claim set forth in first cause of action is shown by Exhibit "B," p. 96 of Trans., and by Exhibit "C," p. 103 of Trans.

That the amount involved in the controversy exceeds the sum of $2,000, as to each cause of action, sufficiently appears by the respective values of the waters alleged to have been so wrongfully taken by defendant.

Paragraph "IV" of complaint alleges that at all times since March 28th, 1891, down to August 28th, 1901, there existed a certain private corporation, acting and doing business as such, named the Artesian Hot & Cold Water Company, Limited, organized and existing under the general laws of Idaho, and that it was the predecessor in interest in the water works rights and properties mentioned in the complaint and in the ownership and operation of the same. None of this allegation or paragraph IV is denied.

Paragraph "V" of the complaint alleges the ownership and operation of the water works of plaintiff's immediate predecessor, that the same were of great value, the nature of the water supply as being from discovered and developed wells on lands owned by the water company and that the waters were not appropriated from any pond, lake, stream or natural source or supply of water, or from any of the public waters of the State. That its business was, among other things,

the operation of a cold and of a hot water plant in Ada County, Idaho, in and in the vicinity of Boise City. That it owned and operated with and on its own properties its own waters only, all situate upon its own lands, except certain underground pipes which run through other lands over which it has easement, right of way and franchise. That its waters are expensive, being developed, supplied and maintained at great cost. That the founders, creators and original owners and first operators of said water plant and water works were H. B. Eastman and B. M. Eastman. That said Eastmans, as soon as they had discovered and developed and collected of such said waters sufficient to supply water for domestic use to the inhabitants of said city, applied for and obtained by grant on the third day of October, 1889, a franchise from defendant city, in words as follows, to-wit:

"AN ORDINANCE GRANTING EASTMAN BROTHERS THE RIGHT TO LAY WATER PIPES IN BOISE CITY.

"The Mayor and Common Council of Boise, City, Idaho, "ordain:

"Section 1. H. B. Eastman and B. M. Eastman and their "successors in interest in their water works, for "the supply of mountain water to the residents "of Boise City, are hereby authorized to lay "and repair their water pipes in, through, along "and across the streets and alleys of Boise City under the "surface thereof· but they shall, at all times, restore and "leave all streets and alleys in, through, along and across "which they may lay such pipes, in as good condition as they "shall find the same, and shall, at all times, promptly repair

"all damage done by them or their pipes, or by water escaping "therefrom.

"Sec. 2. This ordinance shall take effect from and after "its passage and approval.

"Approved October 3rd, 1889."

The source of the water or that it was "mountain water" and the fact that the business was that of operating both a hot and cold water plant in and in the vicinity of said city and the fact that they did operate them, and the fact that the Eastmans applied for and obtained the grant, and the fact that the same company had its office and place of business in Boise City and was the predecessor in the operation of said water works in the city of plaintiff, are matters within the information and sources of information and belief of defendant, and to allege that it "has not sufficient information or belief," is not to allege that it has no information or belief, and it should answer according to its belief, sufficient or otherwise.

The said Eastmans accepted said grant and franchise and immediately continued to lay water pipes in the streets of the city and to extend the same from time to time as they increased their supply of water, and as demand therefor increased, and to charge, collect and receive reasonable water rates from all whom they supplied and did and performed all things obligatory upon them by reason of said franchise and their acceptance of the same and of the operation of said water works under said franchise.

In 1890 said Eastmans and others formed a corporation known as the Boise Water Works Company, under general laws of Idaho as a private corporation, which became and was the successor in interest of the said Eastmans in and to

their said water works, and in said grant and franchise from said city, and as such successor all the duties and liabilities appertaining to said water works and said franchise in the hands of said Eastmans and was by all persons recognized as such successor with such duties and liabilites.

On March 28th, 1891, the Artesian Hot & Cold Water Company, Limited (also designated in the pleadings for convenience as the "Idaho Company") was formed and organized, and became and was the successor of the said Boise Water Works Company, and of said Eastmans, in the said water works and the said grant and franchise made to Eastmans by the city and was so known and recognized by all persons, and acted as such down to August 28th, 1901, and it in like manner, and with like limitation, assumed the duties and liabilities pertaining to said water works and to said grant and franchise which were assumed by and were obligatory upon the said Eastmans, and owned all said water works, properties, rights, franchises and privileges and operated the same as such successor down to August 28th, 1901, and during all these times did and performed all it was obligated to do by virtue of such operation, ownership and successorship.

That said Eastmans and others prospected by deep boring into the rocks of the mountains upon their own lands for both hot and cold waters and discovered the same at an average depth of 400 feet, and that said Eastmans sold and conveyed the wells, waters and lands on which the wells were situated to said water company and that these waters are the waters employed and used in supplying both hot and cold waters to the citizens of Ada County, in and in the vicinity of the said city, for reasonable compensation.

That, in and for the year 1897, the city and the water com-

pany entered into a contract whereby the company was to furnish water for street sprinkling purposes, and the city was to pay for same, and the company was to erect stand pipes for the convenience of the city in taking the water, and to enlarge its water mains within ninety days thereafter from six-inch mains to ten-inch mains.

That in order to have sufficient supply of water for its other uses, and the uses of its customers, together with what, under contracts with defendant, would be used for street sprinkling, and in accordance with the terms and conditions of said contract, and to carry out the same on its part, the said company did, as it had in said contract with defendant agreed to do, within ninety days from and after the execution of said contract, lay a ten-inch main pipe from its pumping station to said city, and that, except for supplying said city with water, as by said contract was contemplated and provided for, the six-inch main which until then extended from said water works, reservoirs and plant to said city, was sufficient and adequate for all purposes and uses of said company and its patrons.

For the year 1898, a like contract was made and entered into between said city and said Idaho Company, whereby said company was to erect and maintain at its own expense, stand pipes for the convenient taking and use of said waters when and where requested so to do by said city, and the said city was to have of its said waters water for street sprinkling purposes at certain agreed rates per front foot of properties abutting on streets sprinkled, the same being in proportion to amounts of water taken and used on various streets respectively, the said city to pay for same at such rates, which it did accordingly; and the said company did all it was required

to do, or was obligated to do, under said contract, or otherwise; that for the year 1899, the said Idaho Company and the said city made and entered into a like contract for water for street sprinkling to those theretofore made as aforesaid, and each party thereto carried out what it was required to do under said contract, except that the said city has not yet fully paid the company the moneys due thereunder.

In each and all of said contracts the said parties thereto distinguished between the taking and using of waters for street intersections and alley crossings and those used on portions of streets before lots abutting thereon, and in which latter case the cost thereof was assessed with other costs of sprinkling same to owners of such lots, and was by the city collected from such owners, and paid over to the said company.

That during the existence of said Idaho Company prior to 1900 it had, as such water company, and as such successor in interest, ownership and operation of said water works, rights and properties and all belonging or appertaining thereto, at all times and continually dealing with said city as such water company, with such rights, privileges and properties, entered into contracts of various kinds with said city concerning the use of its waters and the supplying the same, including contracts for furnishing water for fire purposes and for street sprinkling purposes, and all these contracts were, prior to 1900, faithfully carried out by both parties thereto, and the performance and execution were in every way acceptable to and approved by said city, and were reasonable, fair and legal; and in preparing to carry out what was agreed to in, and contemplated by, said contracts, for water for fire and street sprinkling purposes, it, as was then and there under-

stood, agreed and promised by and between the said parties thereto, became and was necessary and the said company was obliged to, and did, go to great extra cost, labor and expense in the increasing of its water pressure by the maintaining of an extra reservoir, in the erection of stand pipes, in the increasing of its pumping plant, in the purchasing of a steam boiler, engine and pump, and in various and other actual and necessary expenses for such contractual purposes, in all to the extra cost and expense of over twenty thousand dollars, over and above what would have been and is required or necessary for supplying water to the patrons of said water works for all other purposes than street sprinkling. And such said extra expense was incurred in pursuance of contracts with defendant, and in reasonable expectation of, and promise of reasonable compensation for such continuing uses of its said waters in the future, and not otherwise; that always, prior to 1900, the company's right to compensation for water used for street sprinkling was conceded, acquiesced in, and respected by the defendant and by all persons; and defendant contracted thereabout, assessing the cost of same to owners of abutting property on streets sprinkled, and collected the same both by legal proceedings in the courts and otherwise.

That the said Idaho Company at great expense improved said system of water works and largely increased its water supply; it invested in said water works system and property used in connection therewith, a sum equal to three hundred and forty thousand dollars, a large portion of which was made necessary to enable said company to furnish the said city with water for municipal purposes, particularly for sprinkling the streets, and extinguishment of fires, and said

company was, especially during the last two years, put to great additonal expense in the daily operation of its said water works system on account of the great quantities of water taken and used by said city for street sprinkling; such additional expense was in about the sum of nine hundred dollars per month over and above what would have been otherwise required.

That the said Idaho Company had a several and separate contract with said city for each of the years 1897, 1898, 1899, by which the company was obligated to furnish the city water for such municipal purposes and by which the said city agreed to pay to the said company therefor a fixed and stipulated compensation; and that the extra outlays and expenses herein mentioned, as over and above what would otherwise have been necessary, were made in pursuance of such said contracts with said city, and in expectation of compensation from the city for such uses of water by the city.

Said Idaho Company, the immediate predecessor of plaintiff, had no other grant or franchise under which it operated, except that granted to said Eastmans, and operated under that grant and dealt with all persons and with defendant as such water company, the successor of said Eastmans and of said Boise Water Works Company.

The waters of the company are supplied by wells, the natural flow of which is sufficient to nearly supply the necessary amount of water for domestic use and other uses, except for street sprinkling and to keep up the supply when water is taken for street sprinkling requires extra pumping, and all that was taken for street sprinkling had to be supplied by extra labor, expense and pumping.

Said water company dealt with said city, with Ada County

and with the State of Idaho and furnished waters to them, both hot and cold, at all times since its formation in 1891, down to the time it ceased to operate said water works in August, 1901.

In 1900 defendant refused to contract for water for street sprinkling purposes.

Prior to 1897, the water taken from said water works for street sprinkling was obtained from the company directly by the owners or occupiers of lots abutting on streets sprinkled.

In 1897 the charter of the city was amended so as to empower the Mayor and Common Council to "provide for the "sprinkling, cleaning and repairing of the streets at the cost "of owners of abutting property." Thereafter, and down to 1900, the city assumed to and did, instead of said owners of abutting lots, contract for water for such purposes with said company, by which contract it was to pay and did pay a reasonable compensation for water for street sprinkling purposes.

The defendant admits the taking of the waters as set forth in the complaint, but denies the *wrongful taking*.

Plaintiff brings this action to recover damages for the wrongful taking of both hot and cold waters from its said systems. The first cause of action is for waters so taken between January, 1900, and August 28, 1901, while the systems and waters were owned by the said immediate predecessor of plaintiff, and the claim for which was sold, transferred and assigned to plaintiff, together with other properties, rights and claims, on August 28, 1901. The second cause of action is for such taking of hot and cold waters from said systems since plaintiff became the owner of and successor in interest to said Idaho Company in said properties and busi-

ness, and covers the period of time between August 28, 1901, and the bringing of this action. All the waters so taken, both hot and cold, were used upon the streets of said defendant city by defendant for sprinkling the streets.

It has never been the habit, custom, condition or policy in or of the State of Idaho for any city or town to be furnished water for street sprinkling by any person, association or corporation free of charge.

In 1897 the Legislature of Idaho for the first time passed laws regarding street sprinkling and passed an act of general application entitled "An Act to provide for the organization, government and powers of cities and villages," which act provides that cities and villages may enact ordinances for the following purposes: "Seventh. To provide for sprink-

"ling the streets, avenues and thoroughfares therein, or such "parts thereof and for such time as may be deemed necessary, "by contract or otherwise; and to levy a special tax on the lots "or parcels of ground fronting or abutting upon such street, "avenue or thoroughfare, so to be sprinkled, to pay the ex- "penses of such benefit or improvement. The next subdivis-

ion of the section provides how the assessment is to be made, and provides: "All such assessments shall be known as 'spe- " 'cial assessments for improvements,' " and the same provisions are in the act passed in 1899 under same title.

The waters of the systems of water works owned and operated by plaintiff and its predecessors are not appropriated waters, but well waters. Three are hot water wells and the rest, twenty-six in number, are cold water wells, and twenty of them are flowing wells.

Since March, 1900, and prior to August 28, 1901, the defendant took from said water works 250,000 gallons of water

each day for street sprinkling, and to furnish such water into its pipe lines cost the company over $55.00 each day over and above what its expenses would otherwise have been, and that the said water taken was worth the sum of twelve and one-half cents per thousand gallons, and that between such said dates the water was so taken for over 400 days.

There is in, through, around and under the defendant city an abundance of cheap water suitable for street sprinkling purposes.

(Paragraph XIX of the complaint, page 17.)

Neither plaintiff nor its predecessors in interest in said water works enjoy or ever have enjoyed any special, peculiar or exclusive privileges or any monopoly or virtual monopoly.

(Paragraph XX of complaint, page 16.)

Connected with fire hydrants under contract to furnish water for fire purposes; number of hydrants, sixty; used waters on streets where Sonna supplied the inhabitants.

(Paragraph XXI of complaint, page 19.)

Not usage, custom or public policy of State to require free water for street sprinkling.

(Paragraph XXV of complaint, page 21.)

In taking said water company's said waters, the defendant elected to use and consume expensive waters belonging to the company rather than cheap waters running around, through and under said city.

(Paragraph XXVI of complaint, page 22.)

In the year 1900 the city took from said company's water works, water for street sprinkling to the amount of 49,370,-000 gallons, of which 9,874,000 gallons were hot water, out of its said hot water system; and 39,496,000 gallons were

cold water, out of its said cold water system; said waters were then and there of the value and worth of 12½ cents per thousand gallons. The value of the hot water taken in the year 1900 was $1,234.27, and the value of the cold water so taken in 1900 by the city from said company's water works system was then and there of the value of $4,936.98.

That in the sprinkling season of 1901, prior to August 28th, 1901, the city took water from said company's water works to the amount of 33,120,000 gallons, of the worth and value of 12½ cents per one thousand gallons. Of the water so taken in 1901, 6,624,000 gallons were hot water out of said hot water system, and 26,496,000 gallons were cold water out of said cold water system. The value of said hot water taken in 1901 prior to August 28th of that year was $828 and the value of said cold water taken in 1901 prior to August 28th of that year was $3,312, and said company was, by said taking, damaged in the sum and amount of $10,-500, no part of which has been paid and no compensation had on account thereof.

(Paragraph 27 of complaint, page 22.)

That of the waters so taken in 1900 and 1901, prior to August 28th of that year, and used by the city in the sprinkling of streets in front of the lots owned by other persons and abutting on portions of streets sprinkled, water of the value of $7,500 was so taken and used for the benefit and advantage of such owners of such abutting property to the damage of said water company in the sum of $7,500.

(Paragraph XXVIII of complaint, page 24.)

In addition to the said waters so taken as heretofore mentioned by the city from said company's water works, the city did, in 1900 and 1901, in the same manner, take from its said

system of hot water pipes, situated outside of the limits of the city, water to the amount of 1,000,000 gallons and of the worth and value of $125, for which the water company never received any compensation whatever and for which the defendant has refused to pay and has proclaimed and given notice that it will take and will never pay for the same.

(Paragraph XXIX of complaint, page 25.)

That on the 28th day of August, 1901, the said Idaho Company decided, resolved and determined to go out of business and existence and to make plaintiff its successor, and did then turn over and transfer, sell, assign and convey to plaintiff all its properties, business, claims, demands, accounts, rights, privileges, franchises, water works, and all pertaining thereto, and all claims, rights and contracts connected therewith, and all moneys, damages and claims due and owing to it, arising either from contract or *ex delicto*, including this claim and every claim which it had against the city, and the plaintiff did purchase and accept the same and enter into and go on with said business and became the successor of the said Idaho Company, and ever since has remained such successor and as such has dealt with the defendant and all other persons.

Said Idaho Company caused proceedings to be had in an action brought in the District Court of the Third Judicial District of the State of Idaho, County of Ada, such that the judgment and decree of said Court was made and entered dissolving said Idaho Company, and the said company does not now exist, and plaintiff is the successor of the same; owner and operator of said water works, and as such has continually dealt with the defendant and all other persons.

(Paragraph XXX of complaint, page 25.)

The Idaho Company, the immediate predecessor of plaintiff, ceased to do business August 28th, 1901, and ceased to exist, and by a decree of Court was dissolved.

The taking of the waters and the contracts of 1897-8-9 are admitted, except only that defendant denies the power of the city and company to contract on the ground that the water was free, and of no value because free.

One-fourth of the waters taken were for sprinkling blocks in which Mr. Peter Sonna furnishes water to the inhabitants and where said water companies did not furnish any water.

SECOND CAUSE OF ACTION.

The second cause of action is like the first, except as to the value and amount of waters taken and except that it is for damages resulting from the taking of the waters from said water works since August 28th, 1901, and prior to the 1st day of January, 1902, and while this plaintiff was the owner and operator of said water works.

The waters taken between said last mentioned dates from the plaintiff's works by the city and used for street sprinkling purposes amounted to 25,480,000 gallons, and that during said time the defendant wasted waters of the plaintiff to a large amount and to the amount, as plaintiff is informed and believes, of 16,000,000 gallons, of the value of $2,000, to the plaintiff's damage in the sum of $2,000.

That the waters taken from plaintiff's water works during this time and used for street sprinkling was of the value of $3,160.

That of the waters so taken and used in the sprinkling of the streets in front of lots owned by other and private persons,

waters of the value of $2,300 were so taken by the city, to plaintiff's damage in the sum of $2,300.

That plaintiff's waters were taken by the city and used for street sprinkling in blocks where Peter Sonna furnished water to the inhabitants thereof and to those doing business therein to the value, as plaintiff is informed and believes, of $900, to plaintiff's damage in the sum of $900.

Defendant does not deny the taking of the waters as alleged and does not deny the value of the waters so taken according to the several specifications and items set forth in both causes of action constituting the complaint.

Plaintiff proved on a trial that it commenced said business on the 28th day of August, 1901. That it dealt with the city, rendered bills to the city for water furnished, which were paid by the city; that the old company ceased to do business on the 28th day of August, 1901. That the water of the company was from wells, and all but one artesian wells, and that there were, all told, flowing and abandoned wells to the number of 29; that eight or nine had ceased to flow; that nothing had been paid by the defendant on the first cause of action set forth in the complaint. When the witness was asked the following question:

"Q. Has anything been paid for water taken for sprink-"ling purposes by the city that was taken since August 28th, "1901? (Objected to by defendant for the reason that it is "irrelevant, incompetent and immaterial, for the reason that "if it was taken for sprinkling purposes, there could be no "charge made for it by the plaintiff.) The objection was "sustained and exception taken."

The witness testified that the water was taken by the city partly by attaching stand pipes to the fire hydrants and partly by opening the company's valves and taking it from the com-

pany's stand pipes. That the company never gave them permission to do this and always objected to it. That the company served notice upon the city at different times not to take the water for sprinkling purposes, and that Exhibit "D" is one of such notices. That at the time plaintiff company purchased the properties, an advertisement was put in all the papers of Boise, being a notice signed by each company, the one going out and the one coming in, and that Exhibits "F" and "G" are copies of such notices. That they were published in four papers in said city, beginning on the 29th or 30th day of August, 1901. That immediately after receiving the notice of the passage of Ordinance No. 304, the witness served upon the Mayor of the city a notice that the company refused to accept the ordinance, that it did not need the pretended grant the franchise contained, and that it considered the same illegal and void. That the gravity supply of the water company in 1901 was 1,400,000 gallons per year, and that all the rest of the water had to be pumped from wells; that the gravity flow was sufficient outside of lawn sprinkling to furnish the customers of the company for domestic uses; that if no water had been used for sprinkling in the summer of 1901, it would have required on an average 400,000 gallons of water to be pumped each year, and that the taking of water by the city for sprinkling purposes made it require about five hours a day more pumping. Testified that all the cold water that was used for sprinkling the streets was obtained by pumping. That the pump runs by steam power and that coal was used for fuel; that the cost of the water system to the company was between $335,000 and $340,000, and that the cost of the cold water system was from $212,000 to $240,000. The witness was then asked: "Q. I will ask

"you if during the time alleged in the complaint, in which it "is alleged that the defendant took this water, if the cold "water system was paying dividends on properties, or any "profit? (Objected to by counsel for the defendant as incom- "petent, irrelevant and immaterial, for the reasons "that it would be simply a question of fixing the "rates under the statutes as to whether it was pay- "ing or not.) Objection was sustained by the Court. "Exception was taken, and allowed by the Court." The witness Howe gave the above testimony, first testifying that he was the secretary and assistant manager of the plaintiff company and had been, during all the times mentioned, such officer and manager of the plaintiff's predecessor corporation. Testimony of B. S. Howe, beginning on page 88.

Plaintiff's Exhibit "A," page 93, is its certificate of incorporation.

Plaintiff's Exhibit "B," page 96, is the deed given by its predecessor, The Artesian Hot & Cold Water Company, Limited, to the plaintiff on August 28th, 1901, conveying said water works, properties and all pertaining thereto. Plaintiff's Exhibit "C," page 103, is the bill of sale and assignment by plaintiff's predecessor, by which all of the personal property, choses in action, dues and claims of every nature and kind sold and assigned to the plaintiff and its franchises, rights and privileges. Plaintiff's Exhibit "D," page 105, is one of the notices to the Mayor and Common Council not to take water. Plaintiff's Exhibit "E," page 106, is another notice to the Mayor and Common Council of the city given by the plaintiff, forbidding the city to take the water or use the stand pipes and requesting it to cease trespassing upon its property, etc.

Plaintiff's Exhibit "F," page 105, is a notice to the public and to the patrons and customers of the water works, from the plaintiff's predecessor, showing the fact that it had turned

over the water works to the plaintiff. Plaintiff's Exhibit "G," page 109, is the notice of plaintiff on taking possession and beginning business as such water works company.

Defendant offered no testimony except Exhibit "I," page 111, which is a copy of the articles of incorporation of the immediate predecessor of plaintiff.

CONSTITUTIONAL, STATUTORY AND CITY CHARTER PROVISIONS.

A franchise, like other *property*, is subject to the law of eminent domain.

Constitution of Idaho, section 8, article 11, reads: "The "right of eminent domain shall never be abridged or so con-"strued as to prevent the Legislature from taking the prop-"erty and franchise of incorporated companies, and subject-"ing them to public use, the same as property of individuals; "and the police powers of the State shall never be abridged "or so construed as to permit corporations to conduct their "business in such manner as to infringe the equal rights of "individuals, or the general well-being of the State."

STATE COMITY EXTENDED TO FOREIGN CORPORATIONS.

Constitution, section 10 or article XI, reads as follows: "No foreign corporation shall do any business in the State "without having one or more known places of business, and "an authorized agent or agents in the same, upon whom "process may be served, and no company or corporation "formed under the laws of any other country, State or ter-"ritory, shall have or be allowed to exercise or enjoy within "this State any greater rights or privileges than those pos-"sessed or enjoyed by corporations of the same or similar "character created under the laws of this State."

Section 2653 of the Revised Statutes of Idaho, 1887, provides: "Every corporation not created under the laws of "this territory, doing business in this territory, must within "three months after the passage of this title, or from the "time of commencing to do business in this territory, designate

"some person residing in the county in which the principal "place of business of such corporation in this territory is con- "ducted, upon whom process, issued by authority of or under "any law of this territory may be served, and within the time "aforesaid must file such designation in the office of the Sec- "retary of the territory and in the office of the Clerk of the "District Court for such county; * * * provided, how- "ever, that such foreign corporation complying with the pro- "visions of this section shall have all the rights and privileges "of like domestic corporations, including the right to exercise "the right of eminent domain, and shall be subject to the laws "of this territory, applicable to like corporations.'

FRANCHISES MAY BE TRANSFERRED—PUBLIC POLICY RELATING TO SAME.

Section 15, artice 11 of the Constitution reads as follows: "The Legislature shall not pass any law permitting the leas- "ing or alienation of any franchise so as to release or relieve "the franchise or property held thereunder from any of the "liabilities of the lessor or grantor, or lessee or grantee, con- "tracted or incurred in the operation, use or enjoyment of "such franchise, or any of its privileges."

CORPORATIONS—NATURE OF.

Section 2575, Rev. Stat., 1887, reads: "Corporations are "either public or private. Public corporations are formed or "organized for the government of a portion of the territory; "all other corporations are private."

Section 2576, provides: "Private corporations may be "formed by the voluntary association of any five or more

Section 2577 reads: "Private corporations may be formed "for any purpose for which individuals may lawfully asso- "ciate themselves."

Section 2578 reads: "The instrument by which a private "corporation is formed is called 'Articles of Incorporation.' "

Section 2633 provides: "Every corporation, as such, has

"power * * * to purchase, hold and convey such real "and personal estate as the purposes of the corporation may "require, not exceeding the amount limited by this title: " * * * to enter into any contracts or obligations essen- "tial, necessary or proper to the transaction of its ordinary "affairs, or for the purpose of the corporation."

Section 2638 reads: "No corporation must acquire or hold "any more real property than may be reasonably necessary "for the transaction of its business, or the construction of its "works, except such right of way or other property as it may "acquire under the laws of Congress, or as may be otherwise "specially provided. A corporation may acquire real prop- "erty, as provided in the Code of Civil Procedure, when "needed for any of the uses and purposes there mentioned."

Section 2642, Rev. Stat., 1887, reads: "For the satisfac- "tion of any judgment against a corporation authorized to "receive tolls, its franchise and all the rights and privileges "thereof may be levied upon and sold under execution in the "same manner and with like effect as any other property."

Section 2643, Rev. Stat., 1887, reads: "The purchaser at "the sale must receive a certificate of purchase of the fran- "chise, and be immediately let into possession of all property "necessary for the exercise of the powers and the receipt of the "proceeds thereof, and must thereafter conduct the business of "such corporation with all its powers, privileges, and subject "to all its liabilities, until the redemption of the same as here- "inafter provided."

APPROPRIATED WATERS; WHEN A PUBLIC USE AND SUBJECT TO STATE REGULATION.

Constitution, sec. 1, art. XV, reads: "The use of all waters "now appropriated, or that may hereafter be appropriated, "for sale, rental or distribution, also of all waters originally "appropriated for private use, but which after such appropri- "ation has heretofore been, or may hereafter be, sold, rented "or distributed, is hereby declared to be a public use, and "subject to the regulation and control of the State in the "manner prescribed by law."

RIGHT TO COLLECT RATES A FRANCHISE.

Constitution, sec. 2, art. XV, reads: "The right to collect "rates or compensation or the use of water supplied to any "county, city or town, or water district, or the inhabitants "thereof, is a franchise, and cannot be exercised except by "authority of and in the manner prescribed by law."

WHAT WATERS MAY BE APPROPRIATED.

Constitution, sec. 3, art. XV, provides: "The right to "divert and appropriate the unappropriated waters of any "natural stream to beneficial uses shall never be denied."

HOW RATES FOR USE OF WATER ARE ESTABLISHED.

Constitution, sec. 6, art. XV, reads: "The Legislature shall "provide by law the manner in which reasonable maximum "rates may be established to be charged for the use of water "sold, rented or distributed for any useful or beneficial pur-"pose."

STATEHOOD CHANGED NO RIGHTS OR OBLIGATIONS THERETOFORE EXISTING.

Constitution, sec. 1, art. XXI, provides: "It is declared "that all * * * rights of individuals, and all bodies cor-"porate, shall continue as though no change had taken place "in this government."

Constitution, sec. 2, art. XXI, reads: "All laws now in force "in the territory of Idaho which are not repugnant to this "Constitution shall remain in force until they expire by their "own limitation, or be altered or repealed by the Legisla-"ture."

CITY CHARTER PROVISIONS.

COMMON COUNCIL, CONTROL OF STREETS.

Section 139 of the Special and Local Laws of Idaho, 1887, reads: "The roads, streets and alleys within said city limits "shall be under the exclusive control of said Common Council, "who shall make all needful rules in relation to the improve- "ment, repairing, grading, cleaning, etc., of the same; and "said city shall not be included in any road district in said "county."

PROVIDE FOR WATER.

Subdivision 9 of sec. 132 of Special and Local Laws, 1887, reads: "The Mayor and Common Council shall have full "power and authority, within Boise City, to provide the city "with good and wholesome water, and for the erection and "construction of such water works and reservoirs within or "without the limits of the city as may be necessary or con- "venient therefor."

Idaho Session Laws, 1897, page 88, provide: "Sec. 2, "Subdivision 9—The Mayor and Common Council of Boise "City shall have full power and authority in Boise City to "provide the city with good and wholesome water, by con- "tract or otherwise, and for the erection or construction of "such water works and reservoirs within or without the city "limits as may be necessary or convenient therefor."

Subdivision 14, page 89, reads: "To provide for the pre- "vention and removal of encroachments of, in or upon streets, "alleys, sidewalks, avenues, lanes or other highways of the "city; also for the sprinkling, cleaning and repairing of the "same at the cost of owners of abutting property."

These provisions of the charter are re-enacted in an amendment to the charter passed by the Legislature in 1899.

Session Laws of Idaho, 1899, page 312.

Idaho Revised Statutes, 1887, chapter 5 of title 4, entitled "Water and Canal Corporations," provides: "Sec. 2710.

"No corporation formed to supply any city or town with "water must do so unless previously authorized by an ordi-"nance of the authorities thereof, or unless it is done in con-"formity with a contract entered into between the city or town "and the corporation. Contracts so made are valid and bind-"ing in law, but do not take from the city or town the right to "regulate the rates for water, nor must any exclusive right "be granted."

"Sec. 2711. All corporations formed to supply water to "cities or towns must furnish pure, fresh water to the inhab-"itants thereof for family use, so long as the supply permits, "at reasonable rates and without distinction of person, upon "proper demand therefor; and must furnish water to the "extent of their means in case of *fire or other great necessity*, "*free of charge*. The rates to be charged for water must "be determined by commissioners to be selected as follows: " * * *

"Sec. 2712. Any corporation created under the provisions "of this title for the purposes named in this chapter, subject "to the reasonable direction of the Board of County Com-"missioners, or city or town authorities, as to the mode and "manner of using such right of way, may use so much of the "streets, ways and alleys in any town, city or county, or any "public road therein, as may be necessary for laying pipes for "conducting water into any such town or city, or through or "into any part thereof."

ARGUMENT.

This whole contention grows out of the fact that the defendant city has, since March, 1900, claimed to be entitled to *free water for sprinkling its streets*, and, when the water company refused to furnish this unless compensation was promised, the city took it out of the water pipes, hot and cold, belonging to the company.

The city claims this *free water* by virtue of section 2711 of Revised Statutes of Idaho, which reads: "All corporations "formed to supply water to cities or towns must furnish pure,

"fresh water to the inhabitants thereof for family use, so long "as the supply permits, at reasonable rates and without distinction of person, upon proper demand therefor; *and must "furnish water to the extent of their means in case of fire or "other great necessity, free of charge.*"

The chapter from which this is quoted applies to "Water and Canal Corporations," already created and organized. It is no part of the law for the creation of such or any corporation. Private corporations are created and organized under provisions of sections 2575 to 2653 of Revised Statutes, which constitute chapter 1 of title IV of said volume, while section 2711 is in chapter V, same title.

Private and public corporations are the only ones known to the laws of Idaho. Sec. 2575 defines a public corporation and declares that "all other corporations are private."

The next section, 2576, provides that private corporations may be formed "by voluntary association of five or more "persons." Section 2577 provides: "Private corporations "may be formed for any purpose for which individuals may "lawfully associate themselves."

The rest of the said chapter I provides how to incorporate, how to organize, liability of stockholders and such general provisions as apply to all private corporations, organized and existing under the laws of Idaho, whatever may be the business or purposes of the corporation or whether or not it has any property or any business or ever has any property or any business.

But if it is a corporation formed to furnish water to a city, it *may* bring itself under the obligation of sec. 2711 by proceeding under secs. 2710 and 2712, so as to receive from the State, through the city government, the grant and franchise mentioned in said sections.

Sec. 2710 provides: "No corporation formed to supply "any city or town with water must do so unless previously "authorized by an ordinance of the authorities thereof, or "unless it is done in conformity with a contract entered into "between the city or town and the corporation. Contracts so "made are valid and binding in law."

Plaintiff claims that the prohibition of sec. 2710 applies to *corporations* only. And that the provision of sec. 2711 to furnish free water applies to all *such* corporations as have placed themselves under the provisions of secs. 2710 and 2712 by obtaining from the State, through the city, the franchise and grant mentioned in said sections, which are the franchise to furnish water and the grant of right to lay pipes in streets.

Plaintiff claims that the mere fact of existence and organization of its predecessor as a corporation placed it under no such obligation, and that the obligation to furnish free water does not arise until such a corporation has received, from the State through the city, the grant and privilege spoken of in sections 2710 and 2712.

Neither plaintiff nor its predecessors in interest in said water works have ever had, or asked for, or accepted or operated under any grant from State or city issued to any water company corporation.

Plaintiff and its predecessors claim and claimed to operate in the city under and by virtue of the grant and franchise given to their predecessors, the Eastmans, on October 3rd, 1889, which is as follows:

"FRANCHISES.

"An Ordinance Granting Eastman Brothers the Right to Lay "Water Pipes in Boise City.

"The Mayor and Common Council of Boise City, Idaho, "ordain:

"Section 1. H. B. Eastman and B. M. Eastman and their "successors in interest in their water works, for the supply of "mountain water to the residents of Boise City, are hereby "authorized to lay and repair their water pipes in, through "and along and across the streets and alleys of Boise City "under the surface thereof; but they shall, at all times, restore "and leave all streets and alleys in, through, along and across "which they may lay such pipes, in as good condition as they "shall find the same, and shall, at all times, promptly repair "all damage done by them or their pipes or by water escaping "therefrom.

"Sec. 2. This ordinance shall take effect from and after "its passage and approval.

"Approved October 3rd, 1889."

The applying for the passage of said ordinance, and after its passage the continuation of laying and repairing pipes, the expenditure of large sums of money upon said water works, and the improving, developing and adding to the same, constitute an acceptance of the ordinance. The rights, privileges and franchises mentioned in, or necessarily implied by the ordinance, were granted when accepted and acted upon. Upon the faith of such franchise and grant, large sums of money have been expended by the Eastmans and their successors in interest in the said water works. This grant when accepted became property, pertaining to the water works, and by its terms, and, of necessity, property, transferable with the water works properties.

The Eastmans, who applied for and obtained the passage of the ordinance, immediately continued to lay pipes, to repair the same, and to expend moneys to increase their water works system, and they and their successors in interest in these water

works have gone on under the ordinance until nearly $400,-000.00 has been expended.

The act under which the city demands free water for sprinkling purposes was passed in 1887. The ordinance asked for by the Eastmans and granted, was passed and approved October 3rd, 1889.

It is not questioned but what said ordinance was within the power of the city under its charter to ordain.

The Eastmans operated the water works, supplied water to the inhabitants of the city and collected rates for same down to June, 1890, when the Boise Water Works Company was formed, a private corporation organized and existing under the general laws of Idaho. (Chapter I, title IV, Revised Statutes.) This corporation purchased and took possession of the said water works and all the properties connected therewith, including all franchises, rights and privileges, and was the successor in interest of said Eastmans, in and to their said water works, and in said grant and franchise from said city, and assumed, as such successor, all the duties and liabilities appertaining to said water works and to said franchise in the hands of said Eastmans, and was by all persons recognized as such successor with such duties and liabilities.

On the 28th day of March, 1891, the Artesian Hot & Cold Water Company, Limited, was formed and organized and it afterwards became and was the successor of the said Boise Water Works Company and of the said Eastmans in and to the said water works and the said grant and franchise made to said Eastmans by said city, and was so known and recognized by all persons and acted as such down to August 28th,

1901, and assumed all the duties and liabilities pertaining to said water works and said grant and franchise. It owned all said properties, rights, franchises and privileges and operated the same as such successor down to August 28th, 1901. Said corporation dealt with the defendant, supplied water to defendant, for compensation agreed upon, for various purposes, including water furnished for street sprinkling so far as any was furnished the city prior to March, 1900, and furnished no free water for any purpose.

That for the years 1897, 1898 and 1899, it entered into contracts with the city to furnish water for street sprinkling purposes, by the terms of which it was obligated to, and did, increase the size of its water mains, erect stand pipes and enlarge its pumping plant, thereby incurring an expense of over $20,000 in order to furnish the city water for street sprinkling.

In March, 1900, the city refused to contract for water for such street sprinkling purposes, refused to pay or promise to pay for same, and on April 19th, 1900, unknown to the water company and unasked for by it, the city passed an ordinance pretending to grant to the water company the right to lay pipes in the streets, and demanding free water for street sprinkling. The company immediately served notice on the city that it had not asked for, did not need or desire such franchise, and would not accept it, and that it considered the same as illegal and void.

Thereupon and thereafter the city took said waters as set forth in the complaint, continuously, during sprinkling seasons, by claim of right so to do, and without paying therefor, down to the time of filing complaint herein.

Had the city the right to *free water for street sprinkling* purposes from the said water works, at any time? We concede that if it had at any time, it had at all times.

One Peter Sonna, an individual, has and had a system of water works in the city, and supplies and supplied eight blocks of the city with water, and from his system no water was taken for street sprinkling, or was demanded.

Others also furnished water to the inhabitants of the city, and they, and said Sonna, are competitors with the plaintiff, and were with its predecessors, in the business of furnishing water to the inhabitants of the city. None of these competitors were required to furnish water for street sprinkling, or did furnish it, but the waters of plaintiff's water wroks, and of its predecessor, while owned by it, were taken by the city, and used upon streets sprinkled, and a large portion used in blocks and parts of the city where plaintiff does not, and its predecessor did not, supply the inhabitants thereof with water and where the said Sonna does and did. The date of the ordinance and grant by the city to said Sonna was May 24th, 1894, and in 1890, one A. D. Foot was also granted like right and privilege of laying water pipes in the city.

If the city has the power and exercises the right of compelling the plaintiff to furnish water for street sprinkling purposes, *free of charge*, while others under grants like the one made to the Eastmans, who are in direct competition with plaintiff, furnish water to the inhabitants for compensation and are not required to furnish free water, the value of plaintiff's property rights and franchises will be necessarily greatly impaired, if not absolutely destroyed.

Had the Eastmans continued to hold the water works property and the rights, privileges and benefits ordained by the

city on their request on October 3rd, 1889, and to operate the water works continuously from the time such ordinance was passed to present time, and gone on with the improving, enlarging, extending thereof, until the water works were as now, of the value of about $400,000, there is no question but what they would stand as does Mr. Sonna, and as would any individual, or individuals, and that is, stand independent of any obligation to furnish free water. They would then be subject to regulation as to rates, because of the nature of their business. But, because not a corporation, there would be no claim on them for *free water* for any purpose.

We quote from opinion of Messrs. Dickson & Ellis, furnished plaintiff on this question, as follows:

"The granting of this franchise to the Eastmans by the "city, and their acceptance of it, constituted a contract be-"tween them and the city—a contract to which certain implied "obligations and rights attached and which measures the "rights, privileges and liabilities of the Eastmans in the exer-"cise of what was granted them and in the operation of said "water works for such public purposes.

"The Eastmans necessarily took this franchise, when they "accepted it, with the implied obligation, and promised that "they would furnish 'mountain water' to the extent of their "means to the city and its inhabitants, at reasonable rates "and without discrimination, and they received it with the "correlative implied right to charge and collect reasonable "and uniform rates for water furnished the city and its inhab-"itants.

"This obligation to furnish water at reasonable and uniform "rates and the right of the Eastmans to receive payment "therefor arise by *necessary implication* out of the grant.

"The obligation is necessary for the protection of the public "and it is one which always is implied and understood on the "acceptance of such a grant, and on the other hand the grant "itself would be valueless and meaningless if it did not carry

"with it the right in the Eastmans to demand and receive rea-
"sonable compensation for water furnished by them there-
"under.

"While neither the obligation nor the right nor privilege is
"expressed in terms in the grant, yet, being *necessarily implied*
"*from the grant,* they are as much a part of the contract be-
"tween the city and the Eastmans as though written into the
"grant in most explicit terms. When parties have entered
"into a written contract, whatever obligation, liabilty, prom-
"ise or undertaking which the law will impose upon, or charge
"the parties with, when the language used is to be interpreted,
"is as much a part of the contract as though the implied obli-
"gation, liability, promise or undertaking had been written
"into the contract in express words.

"As said by Judge Wilson in Roberts vs. Kneeland, 10
"Wend. 250: 'It is a general principle applicable to all in-
" 'struments or agreements, that, whatever may be fairly im-
"' plied from the terms or language of an instrument, is in
" 'judgment of law contained in it.'

"This is quoted with approval in Hutchinson vs. Lord, 60
"Am. Dec. 381.

"In Fawkner vs. Smith Wall Paper Company (88 Iowa),
"45 Am. St. Rep. 230, it is said, on page 232: 'Another
" 'thing must be borne in mind in determining as to whether
" 'or not the written contract is such that it can be varied
" 'by parol evidence, and that is the *law raises certain impli-*
" '*cation from the terms used in the contract, and whatever*
" '*the law thus implies, from the language used in the writing,*
" '*is as much a part of the contract as that which is expressed*
" '*therein.*'

"In Morgan vs. Dribble (29 Texas), 94 Am. Dec. 264, the
"doctrine is announced: 'Contracts impose upon parties not
" 'merely obligations expressed in them, but everything which
" 'by *law, equity* and *custom* is considered incidental to the
" 'particular contract, or necessary to carry it into effect.'

"In United States vs. Babbitt, 1 Black, (U. S.) 55, it is said
"on page 61, 'What is implied in a statute, pleading, contract,
" 'or will, is as much a part of it as what is expressed.' "

"In Louisville R. R. Company vs. Wilson, 4 Lawyers' "Reps. Annotated, 244, it is said, on page 246: 'In the absence " 'of express stipulation, certain terms are annexed to every " 'contract by legal implication, and stipulations thus imported " 'into a contract become as effectually a part of the written " 'agreement as though they were expressed therein in terms.'

"In Bancroft vs. San Francisco Tool Company, 47 Pac. "684, it is said, on page 686: 'The contention of appellant " 'is that the warranty implied by law * * * is a part " 'of the written contract. In other words, the contention is " 'that *what is by the law implied* in an express contract is as " 'much a part of it as what is expressed. We think the con- " 'tention is founded on firm basis.'

"And the Court quotes from 1 Beach Mod. Cont., sec. 710, "these words: 'What is implied in a contract is as much a " 'part of it as what is expressed.' "

> State vs. Laclede Gaslight Co. (102 Mo.), 22 Am. St. Rept. 789. On page 795 this point is well illustrated.

The ordinance itself shows why it was ordained. It was "for the supply of mountain water to the residents of Boise "City"—not river water or impure water or water of lake or pond, but mountain water. The city had no power to grant to the Eastmans or to any person the use of its streets for laying of water pipes for private purposes merely, but only to serve some public purpose, such as the supplying of the city and its inhabitants with water.

When the Eastmans accepted this grant they agreed to what, by the law and custom in such regard, was necessarily implied, and the city on its part agreed that they might and must furnish such mountain water at reasonable rates, without discrimination, to extent of their means, to its inhabitants for reasonable compensation or rates.

By acceptance and going forward with the water works, this ordinance became a contract, and would, even if it had been a mere license at first, have become on acceptance and the expenditure of money in the laying of pipes, a binding contract. In the hands of the Eastmans and of their successors it became an irrevocable grant—a property right enetring into and becoming an inseparable part of the water works properties.

Reading the grant in the light of these implied obligations, rights and privileges, it is entirely clear that under it the city would have no right whatever to have demanded from the Eastmans free water for any purpose, and had the city assumed to take from the Eastmans, without payment therefor, water for municipal purposes, it would thereby not only have violated its grant, but would have been guilty of taking private property for public use without compensation, in violation of the fundamental law of the land.

As we have interpreted this grant, and, as we think, it was in fact and by necessary implication, so was it interpreted by both the parties herein for over ten years, while the water works were in the hands of the Eastmans, and also at all times while owned and operated by their successors down to March, 1900, as shown by the contracts made by the city with the owners of the water works, and as shown by a course of continual dealings from 1889 down to time when city attempted to repudiate this grant by ordinance 304 on April 19th, 1900, when first it proceeded to act as if the water company was without any rights to act as such in the city, and, on such assumption, to pass the said ordinance giving it such rights and demanding free water. This ordinance 304 was not to give the water company any franchise or right, but was

ordained by the city in order to place the water company under the obligation of said sec. 2711; not granted on request of the water company, but made, no doubt, on advice of attorneys. It pretends to give a right in order to be able to demand free water. It was the city's way to give to itself the property of another free of charge.

The city takes the position that the grant to the Eastmans was, and after acceptance, remained, a mere license, to be withdrawn at any time at the option of the city.

The plaintiff insists that after acceptance and the expenditure of so much money it became a binding contract and a property right appertaining to the water works properties.

When the grant to the Eastmans came to the Artesian Hot & Cold Water Company, Limited, the immediate predecessor of plaintiff, it came to a "successor in interest in their water "works" by purchase of all the properties and by assignment of this grant, and that company took and received it with the same rights and privileges which attached to it in the hands of the Eastmans, and charged with no burden other than those which were imposed upon it while it was held by the Eastmans.

The city seems to take the ground that by reason of the fact that the Artesian Hot & Cold Water Company, Limited, was a corporation formed to supply water to a city, that, on being organized, it must do so by the law of its existence. It must do so whether it ever had any property or not.

Plaintiff takes the positon that these corporations are created and organized and exist under and by virtue of chap. 1 of title IV, and may, and at first do, exist without any property, or any grant, or any franchise, or any power, or any obligation whatever. When such a corporation secures from

the State, either directly or through a city, as part of State, such grant and franchise as are mentioned in said secs. 2710 and 2712, then it might be held to take it subject to the burden imposed by sec. 2711. Its mere existence imposes no burden, and is consistent with its having no property and no powers. No power no duty. After it exists, and is organized, it may or it may not obtain property, and power, and have duties. If after its existence it goes to the State, or to such portion of the State as is called a city, and obtains the franchise spoken of in sec. 2710 and the privilege spoken of in sec. 2712, then, being a person of such nature as is mentioned therein, it takes these franchises and privileges subject to the obligation mentioned in sec. 2711.

Such corporate person is only subject to the burden of furnishing free water imposed by sec. 2711, when it has secured the rights, franchises and privileges from the State, or city as its representative, mentioned in secs. 2710 and 2712.

Such corporate person has by the law under which it exists and by its charter the right and the power to *acquire property* and to purchase water works and their properties, and the right to purchase the water pipes and to purchase the rights, privileges, franchises and everything in nature of property connected therewith, the same as any other person, and these properties do not change their nature or relation by such sale and purchase, but are the same in hands of grantee as in hands of grantor, without respect to the nature of the purchasing person.

This turns upon the question as to whether such grant is or is not property subject to sale and transfer as other property.

City of Quincy vs. Bull et al., 106 Ill. 4 Am. & Eng. Corp. Cas., 554.

The West River Bridge Company vs. Dix et al., 6 Howard 507, Lawyers' Co-op. Ed. Book 12, page 535. In this case it appears that the State of Vermont had granted to a private corporation not only its charter of existence, but with it a franchise to erect and maintain a bridge and charge and collect tolls for passage over it. Afterwards a law was passed under which the bridge and toll road were taken for a public road under the power of eminent domain.

Mr. Webster and Mr. Collomer represented the bridge company. They claimed that it was no exercise of the power of eminent domain as an incident of sovereignty—the taking of private property for public use—but was, in truth and fact, the impairing of the obligation of the contract.

That this was attempted to be effected under the disguise of calling the grant and franchise *property*, when, in fact, it was not property in any such sense as placed it within the power of eminent domain, but "was a franchise, a pure fran-"chise."

In the opinion Mr. Justice Daniel says (page 546, Co-op. ed.): "We are aware of nothing peculiar to a franchise w[illegible] "can class it higher, or render it more sacred, than other prop-"erty. A franchise is property and nothing more; it is incor-"poreal property and is so defined by *Justice Blackstone* when "treating in his second volume, chapter 3, page 20, of the "Rights of Things. It is its character of property only which "imparts to it value, and alone authorized in individuals a "right of action for invasions or disturbances of its enjoy-"ment." And in the same case Mr. *Justice McLean*, in his opinion (page 547, Co-op. Ed.), says: "If the action of the "State had been upon the franchise only, this objection would "be unanswerable. The State cannot modify or repeal a "charter for a bridge, a turnpike road, or a bank or any other "private charter, unless the power to do so has been reserved "in the original grant. But no one doubts the power of the

"State to take a banking house for public use of any other "real or personal property owned by the bank. In this respect "a corporation holds property subject to the eminent domain, "the same as citizens. The great object of an incorporation "is to enable a body of men to exercise the faculties of an "individual. * * *

"The franchise no more than a grant for land can be "annulled by the State. These muniments of right are alike "protected. But the property held under both is held subject "to a public necessity to be determiend by the State. In "either case the property being taken renders valueless the "evidence of the right. But this does not in the sense of the "Constitution impair the contracts.

"The bridge and the ground connected with it, *together "with the right of exacting toll*, are the elements which con-"stitute the value of the bridge. The situation and produc-"tiveness of the soil constitute the value of the land. In both "cases an estimate is made of the values under prescribed "forms, and it is paid when the property is taken for a public "use. And in these cases the evidences of right are incidents "of the property. * * *

"It is objected that this bridge, being owned by a corpora-"tion and used by the public, does not come within the desig-"nation of *private property*. All property, whether owned "by an individual or individuals, a corporation, aggregate or "sole, is within the term. In short, all property not public "is private."

In the same case, Mr. *Justice Woodbury* (page 549, Co-op. Ed.) says: "I concur in the views, that a corporation created "to build a bridge like that of plaintiff's in error, is itself "in one sense a franchise. * * * And in another sense, "that it *possesses franchises* incident to its existence and ob-"jects, such as powers to erect the bridgs and take tolls. I "concur in the views, also, that such a franchise as the incor-"poration is a species of property. * * * It is a legal "estate vested in the corporation. But it is often property "distinct and independent of the other property in land, tim-"ber, goods or choses in action, which a corporation, like a "body not artificial, may own. It is property subject to be "sold sometimes even on execution, and may be devised or

"inherited. And, while I accede to the principle urged by "counsel for the bridge, that the act of incorporation in this "case was a contract, or in the nature of one between the "State and its members, * * * I concur in the views of "the Court that this or other property of the corporation may "be taken for the purpose of a highway under the right of "eminent domain."

The learned Judges give many reasons and bring forward many analogies to sustain the decision that the bridge and the *franchise to take toll may*, like other property, and *because property*, be taken by right of eminent domain in the State for a purely public use, such as a free highway. It seems to us that this early case shows that the learned Judges *felt* the distinction between a franchise of existence and a secondary franchise conferring powers and privileges like that of taking toll, but yet did not claerly make the distinction. Later cases do this, and the difference between a *corporate franchise* and the franchise of a corporation has now been often distinguished.

The Artesian Hot & Cold Water Company, Limited, the immediate predecessor of plaintiff, at first had corporate existence and was organized as a private corporation, then it had no property, had no franchise to furnish water, or to collect rates, had no rights or privileges in the city, no powers and no duties relating to water works—had no water works. But it was an artificial person by reason of a *corporate* franchise really owned by its members, and was such an artificial person as had the right and power to purchase water works, and all that pertained thereto, as rights, privileges and property inseparably connected therewith, and entering into the same as one factor of the value of the property.

Mich. Tel. Co. vs. St. Joseph, 121 Mich. 502, 80 N. W. 383. 80 Am. St. Rep. 520

It could purchase whatever was *property* relating to or entering into a system of water works because it was incorporated to own and operate that class of property A secondary franchise to furnish water to the inhabitants of a city belonged to that class of property. A right to lay and repair water pipes in the streets of a city was also of that class of property.

Such a franchise is intangible property, worth nothing except in connection with tangible property, and the tangible property is but old iron and dead water except for the franchise. Such a franchise is taxable. In Detroit Citizens Street R. Co. vs. Common Council of Detroit, 125 Mich. 673, 85 N. W. 96, and 84 Am. St. Rep. 589, the Court divides franchises into three classes: First, the right to organize and exist; second, the right to act generally, and third, the special privileges which are not possessed by persons under general laws, and says: "The right to exist and act generally (first "and second classes) are not transferable, have no cash value "and are not taxable; but special privileges granted to a cor-"poration or to any person may have a cash value in connec-"tion with tangible property and be taxable."

In this case the different kinds of franchises are distinguished, and franchises of the nature the city granted to the Eastmans are held taxable under general law to tax property, because they are property and are transferable as such. Speaking of such grant, the Court says (84 Am. St. Rep. p. 595): "Special privileges, unlike the right of corporate existence, "have an actual value in connection with the property adapted "to their use and are salable with it." (See Joy vs. Plank "Road Co., 11 Mich. 164.)" This case in 11 Michigan, cited by the Court, discusses many points in question here. On page 164 the Court says: "On the argument of this "cause, this question, so far as it relates to the franchises of "the corporation, was treated as if all the rights and powers

"conferred by the charter constituted but one entire franchise, "which in its nature must be indivisible, no part of which could "be assigned or mortgaged without the whole. I do not think "this is the true view of the subject. But all the several "rights and powers conferred by the charter may, I think, "be treated as so many different franchises, some of which are "essential to the existence of the corporation, while others are "not. Those which are essentially *corporate* franchises, with-"out which the corporation could not exist, and which are, in "their nature, incapable of being vested in, or enjoyed by, a "natural person—such as the right or franchise of being a "corporation, of having corporate succession, etc.—cannot be "made the subject of sale or transfer, without a positive "provision of statute, giving the authority and pointing out "some mode in which such transfer may be effected: as this "would be allowing the corporation 'to transfer its corporate " 'existence into another body'—to create a new corporation, "which is an act of sovereign power only to be performed by "the Legislature." And on page 165, the Court says: "As "a general rule, corporations may, I think, be said to have an "incidental power to dispose of their property, real and per-"sonal, either by sale absolute, or by mortgage or other mode "of security, for any debt which they may rightfully contract, "to the same extent as natural persons, except so far as that "power may be restrained by their charter, by considerations "connected with the purposes of their creation, or limited by "express provision or just implication of some statute, or by "the general policy of the State to be deduced from its legis-"lation." And the Court quotes with approval from Pierce on Railroads as follows: "The proposition that a corpora-"tion cannot perform acts as to its property which will disable "it from performing its public duty, if admitted at all, must "be confined to very limited operations; so limited as to make "the proposition itself doubtful." And on page 168 the Court says: "If the State had adopted a policy calculated to "prohibit, or had failed to provide for, a sale on execution, "of the franchise of taking tolls against plank roads and simi-"lar corporations, this would be a strong argument against the "power to dispose of the same by mortgage; but if the State "has waived, for the benefit of creditors, the injury which "might result to the public by a transfer under execution, "in the absence of any prohibition against mortgaging, I am

"at a loss to discover upon what ground it can be held that "a mortgage of the same property should not be held valid "and to authorize a sale to the same extent." This opinion of the Court is by Judge Christiancy, and in a concurring opinion Judge Campbell says: "It is true that no franchise "that the law entrusts to the discretion of specific legal bodies "can be exercised by any other person in violation of that "trust. But it does not follow, because a certain authority "is vested in a corporation, that its delegation must always "amount to such a violation of trust. No corporation, for "business purposes, was ever created which did not require "a considerable portion of its affairs to be transacted by agents "who are not corporate officers." And after discussion and illustration says, on page 176, "that what this company could "authorize to be done or managed by separate agents for cor-"porate benefit might be mortgaged."

The word franchise is used in so many senses that it has in this respect little meaning unless it is known what is referred to. If the difference between a corporate franchise and a franchise of a corporation was always kept in mind it would avoid much confusion. It is like the old example of distinction, once used to cultivate the child mind—the difference between a salt box and a box of salt.

City of Quincy vs. Bull et al., 106 Ill. 337, 4 Am. and Eng. Corporation Cases, p. 554.

In this case the Court held that the city had power to grant use of its streets to lay water pipes under general powers of control of the streets, and having granted this, the Court says (p. 565, 4 Am. and Eng. Corporation Cases): "This privi-"lege of use of streets by Prince is not a mere license, revoca-"ble at pleasure of the City Council, but it is a grant under "an express contract for adequate consideration received and "binding as such."

In that case the city had simply given permission to lay the pipes in the streets for the purpose of supplying water

to the inhabitants. But the Court held the public benefit was a consideration for the contract which was made and accepted by the work having been done. It is the rule of Common Law that franchises cannot be seized and sold on execution, for two reasons: First, because intangible, and second is that, where franchises are granted for the furtherance of public purposes, creditors are not to be allowed to so enforce their claims as to prevent the corporation from fulfilling its public duties. While this doctrine has been widely accepted as correct, it does not apply to such property of the corporation as is not essential to the performance of those duties; nor does it apply to franchises or properties of corporations which owe duties to the public, no other than would an individual in like business.

Girard Storage Co. vs. Southwork Co. 105 Pa. St. 250.

In this case it was claimed that a mechanic's lien could not be placed upon and enforced against the property because it was property dedicated to a public use. The Court distinguishes between a public use and a quasi-public property. Calls attention to the fact that the only thing that the corporation had received from the State was its franchise of existence and power to act and do business, and that because it dedicated certain property to a public use the property was not public, and the public had no interest in it and could only regulate its use. And the Court illustrated its position by an interpretation of the Munn vs. Illinois case (94 U. S. 113, Law. Ed., Book 24, p. 77), and the Court says: "Nor can "we understand how the case of Munn vs. Illinois, 4 Otto, "113, can affect the case in hand. The question there involved "not the rights of a corporation but those of a private person, "and the principle involved in the ruling of the Supreme

"Court of the United States was that where the owner of such "property as a warehouse, devotes it to a use in which the "public has an interest, he, i neffect, grants to the public an "interest in such use and must therefore, to the extent thereof, "submit to be controlled by the public for the common good "as long as he maintains that use, but he may at any time "withdraw his thus implied grant by discontinuing the busi-"ness from which it arises. But it certainly does not follow "that because of this public interest, the property of a private "person is made public property, or even quasi-public prop-"erty, or that it is therefore exempt from ordinary execution process."

This case at bar must be distinguished from a class of cases—mostly railway cases—where corporations are held to have no power to dispose of franchises and property necessary to the performance of duties they owe to the public. This class of cases is described by Justice Miller in Thompson vs. West Jersey R. R. Co., 101 U. S., 71, as folows The learned Judge says: "That principle is, that where a "corporation, like a railroad company, has granted to it by "charter a franchise intended in a large measure to be exer-"cised for the public good, the due performance of those func-"tions being the consideration of the public grant, any con-"tract which disables the corporation from performing those "functions which it undertakes without the consent of the "State, to transfer to others the rights and powers conferred "by the charter, and to relieve the grantees of the burden "which it imposes, is a violation of a contract with the State, "and is void as against public policy. This doctrine is as-"serted with remarkable clearness in the opinion of this court, "delivered by Mr. Justice Campbell, i nthe case of R. R. R. "Co. vs. Winnans, 17 How. 30 (58 U. S. 27). The cor-"poration in that case was chartered to build and maintain "a railroad in Pennsylvania by the legislature of that state. "The stock in it was taken by a Maryland corporation, call-"ed the Baltimore and Susquehanna Railroad Company, and "the entire management of the road was committed to the "Maryland Company, which appointed all the officers and "agents upon it, and furnished the rolling stock. In refer-

"ence to this state of things and its effect upon the liability of "the Pennsylvania corporation for infringing a patent of the "defendant in error, Winnans, this Court said: 'This conclu-"sion (argument) implies that the duties imposed upon plain-"tiff (in error) by the charter are fulfilled by the constitution "of the road and that by alienating its right to use and its "powers of control and supervision, it may avoid further res-"ponsibility. But these acts involve an overturn of the rela-"tion which the charter has arranged between the legislature "and the community. Important franchises were conferred "upon the corporation to enable it to provide facilities for "communication and intercourse, required for public conven-"ience. Corporate management and contral over these were "prescribed and corporate responsibility for their insufficiency "provided as a remuneration for their grant. The corpora-"tion cannot absolve itself from the performance of its obli-"gation wit hthe consent of the Legislature."

We have cited and quoted from the above where it held that certain corporate rights, corporate franchises and corporate properties *could not be sold or transferred,* in order to the better distinguish between that class of ca ses and the clas s to which this case at bar belongs. In those cases the corporationn had been created to do a specific thing, had received franchises on promise to do that thing, and corporate control and corporate management had been prescribed, and corporate responsibility required by the State, and, undertaken by the members of the corporation, to obtain their grant. Here there has been no attempt to transfer anything granted by any charter. There is here no grant from the State connected with any charter except the right to do business and to act as a corporate company. No rights or powers have been attempted to be transferred which were granted to the Artesian Hot & Cold Water Company, Limited, by its charter, or granted to it, or to any corporation, in any manner, or by any gov-

ernmental power. No attempt to relieve the said company of any burden imposed by its charter, no attempt to violate any contract express or implied, it had with the State. The sale to plaintiff did not affect its existence, did not take from it or in any way effect its right, or power, to do business, but left it as it was when it first became a corporation, and as powerful, and as free t oact, as a water company, as it was when first organized; it was as free to purchase the Sonna system of water works and pipes, with the like franchise to lay pipes in the streets of the city, as it was to purchase the Eastman system, or it could havee purchased the efranchise granted to Foot and others, and laid new pipes or it could buy back from plaintiff all it had sold. If it was the State acting through the city that made the Eastman grant, then that grant was by its terms transferrable to "their successors in interest in their said water works."

Is case at bar not to be distinguished from one where a railroad company, chartered to build a particular road and given powers and privileges in its charter as its corporate franchises, does build it, and then attempts to sell or lease it? Such corporation cannot sell or lease the road and franchises without ceasing to have the power to perform the function for which it was created. The question whether right of way and franchise granted by a city to operate a railway may be transferred and the question of when it is not against the public policy of a state are aptly illustrated in the case of the New Orleanse Spanish Fort etc., R. R. vs Delamore, 114 U. S. 501, Law Ed., Book 29, p. 244. The Supreme Court held that the franchise granted by the city of New Orleans, giving right of way to build and use track for railway purposes wholly within the city might be transferred without the con-

sent of the city, and on the ground that such franchises were part of the tangible property, and that the property could be mortgaged and therefore sold in any manner; and that because as it could be in one manner, and that manner on execution sale, that therefore it was not against the public policy of the State that such franchises be sold. Now as the laws of Idaho provide for sale of all franchises on execution, it is equally not against the public policy of the State that such franchises be otherwise sold. Sec. 2642 of Revised Statute of Idaho provides "For the satisfaction of any judgment "against a corporation authorized to receive tolls, its fran- "chises and all the rights and privileges thereof may be levied "upon and sold under execution in the same manner and wi. "like effect as any other property."

State vs. Western Irrigation Canal Co., 40 Kan 96.
S. C. 10 Am. St. Rep. 166.
Miners Ditch Co. vs. Zellerbach,. 37 Cal. 543.
Willamette Woolen Mfg. Co. vs. Bank of Brit. Col
119 U. S. 191. L. Ed. 30, 384.
Coe vs. Columbus etc. R. R. Co. 10 Ohio St. 372.
S. C. 75 Am. Dec. 518.
Bardstown and Louisville R. R. Co. vs. Metcalfe, 4
Metcalfe (Ky.) 199. Same case 81 Am. Dec 541.
Detroit vs. Mutual Gal Light Co., 43 Mich 594.
State ex rel. Goddard Atty. Gen'l. vs. Topeka Water Company, decided March 10, 1900, found in Vol. 12 (New Series) Am. & English Corporation Cases 250; 60 Pac. 337.

In the above water cases many of the questions raised by the respondent here were disposed of by the Court:—including right to sell secondary franchises with tangible property and

right of foreign corporation to purchase, hold and exercise the same.

So distinct and different is teh franchise to lay pipes in the streets of a city, for furnishing water to its inhabitants, from such franchises as are corporate and came from the State, that in Michigan where, as in Idaho, the formation of a corporation is under the general state, and the right t olay pipes in the streets of a city for the purpose of furnishing gas to the inhabitants is from the city, that the Supreme Courts of Michigan, composed of Cooley, Campbell, Marston and Graves, decided that such a franchise is not a State franchise but a local easement resting on contract or ordinance of the city and as it comes not under State law or State policy, and is a matter in which the State has no interest and that *quo warranto* does not lie for any violations of contract or ordinance, or for such exercise without authority from the city.

The People *ex rel* W. C. Mabury, vs. Mutual Gas Light Company of Detroit, 38 Mich. 154.

Attorney General vs. Railway Company, 96 Mich., 65

In this latter case, under a statute providing that an information in nature of *quo warranto* would lie "whenever any corporate body shall exercise any franchise or privilege not conferred upon it by law." Court held it was not a State franchise but a mere grant of authority, which, whether coming from privatee owners or public agents, rests in contract or license and in no way concerned the State, and this in a case where it was claimed a street railway company was exercising the franchise of maintaining its tracks and operating its road in the streets of a town.

To same effect People vs. Railway Co., 92 Mich. 522.

In Idaho, as in Michigan, the right to lay pipes in the streets is not granted directly by the State but by the city under power given it by the State. And such grant is a contract protected by the Constitution of the United States.

New Orleans Gas Co., vs. Louisianna, 115 U. S. 650. (Law Ed., Book 29, p. 516.)

New Orleans Water Works Co., vs. Rivers, 115 U. S. 674. (Law Ed. Book 29, p. 525.)

Atlantic City Water Works vs. Atlantic City, 39 N. J., Eq. 367; 10 Am. and Eng. Corporation Cases, 59.

City of Quincy, vs. Bull, 106 Ill. 337. 4 Am. and Eng. Corp. Cases, 554.

The court says: "By the 11th Section," (of the ordinance) "the right of way is granted to him in all the streets and al-"leys of the city for the purpose of laying pipes and mains "and sewers, etc. * * * The ordinance and the accep-"tance of it by Prince constituted a contract between him and "the city of Quincy." * * * "This privilege of the use of "the streets is not a mere license revocable at pleasure of the "city, but it is a grant under express contract for an ade-"quate consideration." The consideration was the xpenditure of money by the grantee and the putting in of water works which are a public good.

Williams vs. Mutual Gas Company, 4 Am. and Eng. Corp. Cases 66.

Here the court held that "There rights and privileges were "granted that corresponding duties and benefits might inure "to the citizens when the rights and privileges conferred "should be exercised." The Eastmans and successors as long as they exercise the privileges granted by the ordinance and lay and maintain pipes in the streets for furnishing of water, must furnish good water, and to every inhabitant and person

on demand without distinction or discrimination. This obligation was by necessary implication a part of the contract with the city undertaken by their acceptance of the grant.

> Derby Turnpike Co. vs. Parks, 10 Conn. 522; 27 Am. Dec. 700.

This case holds such a grant as was given to Eastmans is a contract irrevocable and no consideration necessary because it was an executed grant.

> Hudson Tel. Co., vs. ersey City 49 N. J. L. 303, 60 Am. Rep. 619.

This case holds that the telephone company had an irrevocable right to the use of the streets for its poles after permission given, accepted and money expended by the company. Had the Common Council of the city power to revoke such permit, it could convert the property of the company to the character of a nuisance.

> Board of Mayor etc. of Morristown vs. East Tenn. Tel. Co., 115 Fed. 304.

On page 307 the court says: "The consent to the occupan-
"cy of the streets by the poles and wires of the telephone com-
"pany for the purpose of maintaining a public telephone sys-
"tem was the grant of an easement in the streets and the con-
"veyance of a nestate or property interest, which, being in a
"large sense the exercise of a proprietary or contractual right
"rather than legislative, was irrevocable after acceptance, un-
"less the power to revoke or alter was reserved. This princi-
"ple has too many times been declared and applied by this
"court to require further elaboration. Detroit Citizen's Street
"Railway Co., vs. City of Detroit, 12 C. C. A. 365, 64 Fed.
"628; Louisville Trust Co. vs. City of Cincinnati, 76 Fed.
"296; Iron Mountain R. Co. vs. City of Memphis, 37 C. C.

"A. 416, 96 Fed. 113; Citizens Ry. Co. vs. Africa, 23 C. C. A. "252, 77 Fed. 501."

New York vs. Second Avenue R. R. Co., 32 N. Y. 272.
Mayor etc, of Huston vs. Huston City Street R. R. Co. 83 Tex. 548, 29 Am. St. Rep. 679.

Grant of use of street for street R. R. purposes when accepted and acted upon is irrevocable and a vested right.

People vs. Obrien, 111 N. Y. 1; 7 Am. St. Rep. 684.

This case holds, under laws similar to Idaho, on this subject, that, "An interest in the streets of New York City may be "granted in perpetuity and irrevocably, by the city authorities. "Grant of franchise to construct a street railway will be con-"strued as an irrevocable grant in perpetuity, though the cor-"poration to which it was granted was created for a limited "period only. Franchise to construct and maintain a street "railway is not a mere license or privilege enjoyable only dur-"ing the life of the grantee, and revocable at the will of the "State. It has been uniformly regarded as indestructible by "legislative authority, and as constituting property in the "highest sense of the term. Reservation of the right to repeal "the charter of a corporation enables a legislature to effect a de-"struction o the corporate life, and disable it from continuing "the corporate business; but personal and real property ac-"quired by the corporation during its lawful existence, rights "of contract or choses in action so acquired, and which do not "in their general nature depend upon the powers conferred by "the charter, are not destroyed by such repeal. Franchise to "construct and maintain a street railway survives the dissolu-"tion of the corporation grantee, resulting from the repeal of "its charter and enacted pursuant to a right of repeal reserved "by the legislature. Statute atempting to take from the Broad-"way Surface Company, its stockholders and creditors, its "franchises and property, and bestow them upon the munici-"pality of New York, or to direct a sale of such franchise, "and the payment of the purchase price to such city, is uncon-"stitutional, and therefore void." This case covers many of the

points here to be considered and the notes to the case, found on pages 720 to 726 are also a most important brief on the whole subject.

Town of Arcata vs. Arcata & M. R. R. Co., decided by the Supreme Court of California in 1892, reported in 28 Pac. 676, in which the court says: "There is no merit in the contention "that the order of March 9, 1885, was a mere license revoca- "ble at the pleasure of the board. After the defendant had "acted upon the terms of the order, and expended money "in the construction of the road, the board could not rescind "or recall the privilege it had granted, unless the company "failed to comply with the terms or conditions of the grant."

The nature of the franchise granted to the Eastmans is such that, in our opinion, had it been granted by the city to the plaintiff company, or to any other corporation formed for the purpose of owning and conducting the said systems of water works in said city, still it could, like any other property, be sold and transferred, as a property right belonging to and inseparable from the tangible property, and that such grant, or privilege, or easement is amalgamated with the tangible property and exists and can be transferred independent of the nature of the person owning the property and is unlimited by the life of the corporation owning it as really as by the life of the Eastmans. Such a secondary franchise must be distinguished from the kind of secondary franchises often issued by a State to a railroad company, as a part of its charter. This railway company class of so-called secondary franchises is described in Commonwealth vs. Smith, 10 Allen, 448; 87 Am. Dec. 674, where the Court says: "The general power "to dispose of and alienate its property is also incidental to "every corporation not restricted in this respect by express "legislation or by 'the purposes for which it is created, and " 'the nature of the duties and liabilities imposed by its char-

"'ter.' Treadwell vs. Salisbury Mfg. Co., 7 Gray, 393.
"(66 Am. Dec. 490.) But in the case of a railroad com-
"pany, created for the express and sole purpose of construct-
"ing, owning and managing a railroad; authorized to take
"land for this public purpose under the right of eminent do-
"main, whose powers are to be exercised by officers expressly
"designated by statute; having public duties, the discharge of
"which is the leading object of its creation; required to make
"returns to the Legislature—there are certainly great, and, in
"our opinion, insuperable objections to the doctrine that its
"franchise can be alienated, and its powers and privileges con-
"ferred by its own act upon another person or body, without
"authority other than that derived from the fact of its own
"incorporation."

Such is the nature of a class of secondary franchises that cannot be transferred. In no respect does the grant to the Eastmans resemble them.

We admit that the grant to the Eastmans, or any such grant, of use of streets of a city to any person or corporation is, *when granted*, a mere license, and until the grantee has availed himself of the privilege, and has laid pipes, been to expense and thus accepted the grant, it can be recalled, but after acceptance and the expenditure of moneys on the faith of it, it becomes in the nature of a contract, is a vested right, enters into and makes valuable the tangible property, which, if it was revoked, would be almost worthless.

> Port of Mobile vs. Louisville & N. R Co., 84 Ala. 115;
> 5 Am. State Rep. 342.

In this case, speaking of an ordinance allowing use of streets for track for operating railway within the city, the Court says: "The privilege thus granted is thus obviously
"a franchise of the most valuable kind, being one of the most
"common examples of such a grant or privilege. Davis vs.
"Mayor, 14 N. Y. 506; 67 Am. Dec. 186, 193. It is cer-

"tainly a 'right, privilege or franchise' within the meaning
"of the company's charter, having reference, as it does, to the
"construction and management of the railroad and the con-
"duct of its business of transportation within the limits of
"the city of Mobile. Such a special privilege conferred di-
"rectly by legislative enactment, or in a mode provided for
"by such enactment, becomes a contract between the State
"and the corporators, and as such, has always been protect-
"ed from impairment by legislative action by virtue of both
"the Federal and the State Constitutions, each of which pro-
"hibits the passage of any law by which the obligation of
"existing contracts is impaired or lessened. City of Burling-
"ton vs. Burlington Street Railway Co., 49 Iowa, 144; 31
"Am. Rep. 145. 'A grant in its own nature,' observed Chief
"Justice Marshall in Fletcher vs. Peck, 6 Cranch, 87, 137,
" 'amounts to an extinguishment of the right of the grantor
" 'and implies a contract not to reassert that right'—a prin-
"ciple which has been held in this State to be applicable to
"franchises lawfully granted by a municipal corporation.
"Stein vs. Mayor, etc., of Mobile, 49 Ala. 362; 20 Am. Rep.
"283.

Stein vs. Mayor, etc., of Mobile, 49 Ala. 362; 20 Am. Rep.
283, in which the Court says: "The authority of the city
"does not extend beyond these limits. It is a grant to Stein
"by the city for this purpose; that is, a grant to him to
"carry on the business of his water works in the city, under
"his contract. 'A contract executed as well as one which is
" 'executory, contains obligations binding upon the parties.
" 'A grant, in its own nature, amounts to an extinguishment
" 'of the right of the grantor and implies a contract not to
" 'reassert that right. A party is, therefore, always estopped
" 'by his own grant.' Marshall, C. J., in Fletcher vs. Peck,
"6 C. R. 87, 137. The city of Mobile by its ordinance or
"by-laws proposes to restrict the privilege thus granted to do
"business in its limits under the contract above referred to,
"unless Stein shall purchase a license by a fine or tax, which
"is arbitrarily imposed by the city government. Can this
"be done? This is the sole question in this case. Evidently,
"the power of a city as a corporation, over its contracts, is no
"more than that of a citizen in a like case. A corporation can-
"not revoke a grant once made, and it cannot obstruct the full

"enjoyment of the privileges secured by it. *The power to "supply the inhabitants of the city with water necessarily im- "plies the right to carry on this business in the city;* if this "right should be interfered with at all, as there is no limit to "the interference, it may be defeated altogether. The con- "tract shows that this was not the purpose of the party. The "city government is the creation of the State Legislature. Its "powers, then, are restrained by all the constitutional laws of "the General Assembly of the State. It cannot pass by-laws "or ordinances which impair the obligation of contracts. Ang. "& Ames on Corp., secs. 18, 332, 333, 334, 335; Cooley's "Constitutional Limitations, 192, 193, 198. It cannot, then, "revoke its grant. This would be to impair a contract. "6 Cranch, 137, supra. The ordinance which assails the "privilege already granted impairs the contract on which it "depends, and is void; and the tax levied under its authority "by way of license cannot be supported."

Memphis & Little R. R. Co. vs. James H. Berry, etc., as Board of Commissioners; 112 U. S. 609—L. Ed., Book 28, p. 841. We quote: "The franchise of being a corporation "need not be implied as necessary to secure to the mortgage "bondholders, o rthe purchasers, at a foreclosure sale, the sub- "stantial rights intended to be secured. They acquire the "ownership of the railroad and the property incidental to it, "and the franchise of maintaining and operating it as such; "and the corporate existence is not essential to its use and "enjoyment. All franchises necessary or important to the "beneficial use of the railroad could as well be exercised by a "natural person. The essential properties of corporate exist- "ence are quite distinct from the franchises of the corpora- "tion. The franchise of being a corporation beongs to the cor- "porators; while the powers and privileges vested in and to be "exercised by the corporate body as such, are the franchises of "the corporation. The latter has no power to dispose of the fran- "chise of its members, which may survive in the mere fact "of corporate existence, after the corporation has parted with "all its property and all its franchises. If, in the present in- "stance, we suppose that a mortgage and sale of the charter "of the railroad company created a new corporation, what "becomes of the old one? If it abides for the purpose of re- "sponding to obligations not satisfied by the sale, or of own-

"ing property not covered by the mortgage or embraced in "the sale, as it may well do, and as it must if such debts or "property exist. Then there will be two corporations co-"existing under the same charter."

We conclude: That the city had the power to pass the ordinance of October 3rd, 1889, in favor of the Eastmans; that the ordinance was accepted by the Eastmans and then became irrevocable without consent of the holder of the grant.

That by it the said Eastman's and "their successors in in-"terest in the water works, were empowered to lay, maintain and repair water pipes in the streets of the city, and under the surface thereof, and to supply the inhabitants of the city with "mountain water," on demand, to the extent of their means, and at reasonable rates and without discrimination, and that both parties were bound by such contract and grant when accepted.

That in the Eastmans and their successors the same became a property right entering into and inseparable from the water works property and was a factor of the value of the same.

That such water right, or easement, or grant, was property, and of the water works property.

That it was transferable to the successors of said Eastmans, as property and as pertaining to the said water works.

That said Eastmans did sell and transfer the same with all their water works properties to the Boise Water Works Company, a corporation. That said Boise Water Works Company sold and transferred the same to the Artesian Hot & Cold Water Company, Limited, an Idaho corporation, and that said Idaho corporation sold and transferred the same, with the water works properties, to this plaintiff, a corporation of West Virginia; and that each of these parties had the

power both to purchase and own and to sell and transfer the same.

We claim that this property or franchise, or privilege, or grant, or power, or easement, or secondary franchise, whatever it is called, whether any one, or all of above named things, was the same thing in the hands of each of the successors of said Eastmans, as it was in the hands of the said Eastmans, with like powers and privileges, and the same and no other obligations or burdens.

The position of the defendant is, and since March, 1900, has been, that by reason of the nature of the artificial persons, which have successively been successors of the Eastmans, they were each, while owners of this property, under the *additonal obligation* to furnish free water under provisions of said section 2711, and that while the Eastmans were not, and said Sonna is not bound to furnish free water, because *natural* persons, that the said prior corporation successors of the Eastmans were and plaintiff is so obligated because each of the former were and plaintiff is a corporation, such as is described by said section 2711.

On the other hand, plaintiff contends, and its said predecessor corporation contended, that they each respectively had a right to purchase and own this property, including the said Eastmans' grant, which is also property, and that, in taking the same, by purchase and transfer as such successor, they each paid what it was worth, as it was in hands of their predecessor respectively, and took it the same as it was at first, and with no additional burdens. That to place upon said property and franchise and grant the burden of furnishing free water under said section 2711 would be to destroy the value of what they purchased.

Some of the cases already cited are authority for this position.

The case of the Santa Ana Water Company vs. Town of San Buenaventura, 56 Fed. 399, does in our opinion dispose if this last question.

In that case the town of San Buenaventura had granted to three individuals the privilege of furnishing the town with water for fifty years. At time of granting this, under a statute of California exactly like that of Idaho, on which defendant relies, a grant to a corporation formed to supply water to a town, required the furnishing of free water "for fire and "other great necessities," and also, like the Idaho statute, required the rates to be fixed by a commission chosen one-half by the town and one-half by the water company; in fact, Idaho sections 2710, 2711 and 2712 are taken from the California statute in force when the town of San Buenaventura made this contract with Arnaz and his associates. The town made a grant and contract with these natural persons such as it could not have done at that time with a corporation. Arnaz and his associates transferred the same and their water works to a corporation formed to supply the town with water. The town ratified this transfer, but this we consider immaterial, for at time of such ratification the town could not have made such a grant and contract with a corporation as had been made with Arnaz and his associates. The only effect such a ratification could have was to consent to the transfer. It did not affect the *nature* of the grantee corporation or the nature of the contract and grant to Arnaz and associates.

And the question was then, and now, "Could a corporation "formed to supply a town with water purchase such a grant "and operate it just as could the natural persons to whom it

"was first granted?" Or did the obligations of said sections of the statute so pertain to the *nature* of the corporation that it could not furnish the water under a grant and contract originally made to and with individuals except by assuming the obligations that would have been assumed by a corporation had the grant at first been made to a corporation?

In the opinion of the Court on p. 345 the learned Judge says: "It is clear that if the contract entered into between "the town and Arnaz and his associates * * * was a "valid contract and passed by assignment to the complainant "corporation, the obligation of that contract was protected "by the Constitution of the United States against impairment "by any act of the State, constitutional or statutory."

Here was a corporation organized under an act of Legislature of California approved April 22nd, 1858, from which the sections of the Idaho act are taken. As to fixing of rates, "was nature of the grantee corporation to govern, or were the "provisions of the contract as it was in the hands of individual "grantors to govern?" The Court, on page 348, says: "Arnaz and his associates were individual citizens. They were "not in any way bound to enter into the contract with the "Board of Trustees of the town. By the exercise of none of "its prerogatives as a governing body could the municipality "compel them to do so. The contract required their assent "as well as that of the Board of Trustees. Of course, in entering into it they did so under existing laws: but no then "existing law has been pointed out, reserving to the State or "to the municipality the power to fix the rates the town, "through its Board of Trustees, contracted should be fixed "by Arncz and his associates. A statute of the State, approved May 3rd, 1852, providing for the incorporation of "water companies, declared in its third section, provided in "substance that a water company must allow the city to regulate the rates and that no exclusive right could be granted for "to exceed twenty years."

And the Court, continuing, on page 349 says: "That pro-

"vision had no application to Arnaz and his associates, for "the reason that they were not incorporated under that or any "other act."

After citing many authorities and giving many good and sufficient reasons, the learned Judge, on page 351, says: "I "am of opinion therefore that the contract in question in the "present case, in so far as it reserved to the parties of the "first part the unrestricted right to establish such rates for the "supply of water to private persons as they may deem expe- "dient, provided that such rates be general and subject, also, "to the implied condition that the rates be reasonable, was "a valid contract in the hands of Arnaz and his associates. "Did their rights in that respect vest by the assignment in the "complainant corporation?"

The Court holds that the "corporation was competent to "take by assignment whatever rights the contract of January "4, 1869, conferred upon Arnaz and his associates and that "were assignable by them."

In our opinion, an examination of this case, a comparison of the Constitution and laws of Idaho with those of California, at that time, and an examination of the authorities cited by the Court in the opinion in the case, establish the right of plaintiff, and of each of its predecessor corporations, to purchase and operate under the grant to the Eastmans, without incurring the obligation to furnish free water, any more than were the Eastmans obligated to do; and it will not be contended that the Eastmans ever were, or ever would be, so obligated if they had never sold their water works and had continued to operate them under this grant to present time.

The case of Los Angeles vs. Los Angeles Water Company, 177 U. S. 558; L. Co-op. Ed., Book 44, page 886, is in point as to rights to transfer Eastman grant and as to rights and privileges being the same in hands of a corporation grantee the same as in the hands of the individuals who were grantors.

Certain exclusive privileges had been granted to three individuals, Griffin, Beaudry and Lazard, and the question was as to whether the water company had the power or right to purchase, hold and enjoy these exclusive privileges. The Court held that the corporation could hold and enjoy the special privileges granted to the individuals and by them assigned to the corporation. The grant and contract was made to Griffin and associates in July, 1868. In August, 1868, they and others formed the water company corporation and afterwards the grant, contract and privileges and rights were assigned by the individuals to the corporation. There was no question but what the grant and franchise was one that, at the time it was made, and at time assigned, could not have been made with a water company corporation, both on account of the Constitution of the State, and on account of the fact that at that time California had the same statute as the one now relied on by defendant, which statute provides how rates are to be fixed which a water company corporation may charge.

In that case the point was squarely made that "the water "company had no power under its charter to collect water "rates, except as prescribed by the Constitution and statutes "of the State." The Court held otherwise.

The provisions of the Constitution and of the statutes of California relied on in that case are same as on same subject are in Constitution and statutes of Idaho.

The question there was and here is whether the nature of the corporation controls or the nature and powers of the contract and grant, or whether such property may be sold and assigned, and the assignee take it the same as it was in the hands of the assignor and grantor.

Los Angeles Water Company vs. City of Los Angeles, 88 Fed. 720.

This is same as above case in the Circuit Court and here the city contended that (p. 737) "The limitation in said con-"tract as to water rates is void because of the act of May 3rd, "1852 (St. Cal. 1852, p. 171). Said act, however, is not "applicable to case at bar, for the reason that Griffin, Beau-"dery and Lazard at date of said contract were not incorpor-"ated under that or any other act. The following extract "from the case of Santa Ana Water Co. vs. Town of San "Buenaventura, 56 Fed. 348, 349, is directly in point": and after quoting from this case the Court says that the act "does "not purport to abridge the powers of municipal corpora-"tions, except in their dealings with private corporations cre-"ated under said act. The powers of municipal corporations "in their dealings with individuals are unaffected by said act "of 1852." The opinion in this case in 88 Fed. contains many citations and quotations directly in point, and which, in our opinion, do, as well as does the opinion itself, establish the fact that the water company corporations had each the power and right to purchase, and operate under, the Eastman grant and franchise, and that such property was in the hands of these, their successors, the same as in the hands of the Eastmans, and that the nature of the grantee did not change nature of the thing granted.

That the Eastmans had the power to sell and transfer this grant and franchise cannot be questioned, for by its terms it is made to "their successors in interest in their water "works."

That it became and was a property right, we think, must be admitted. That each of the successors of the Eastmans respectively had the power to purchase the water works and this property, or property right, is shown by the nature of the said corporate successors, and that the property, right, franchise, grant, easement and property right did not change its nature by such purchase and sale seems to us well estab-

lished by the authorities and to be in accordance with reason and right.

Planters Bank vs. Sharp et al., 6 Howard, 30, on page 326 the Court says: "Hence the general powers which still exist "under other governments, or might once have prevailed here "in the States, to change the tenor and rights over property "and especially the *jus desponendi* of it cannot now, under "the Federal Constitution, be exercised by our States to an "extent affecting the obligation of contracts."

DePeysler vs. Michael(6 N. Y. (2 Selden) ,467), 57 Am. Dec. 470. On page 475 the Court quotes from Grotius these words:

"Since the establishment of property, men who are masters "of their own goods have by the law of nature the power of "disposing of or of transferring all or any part of their "effects to other persons; *for this is the very nature of prop-* "*erty.*"..And from Aristotle: "*It is the definition of prop-* "*erty to have in one's self the power of alienation.*" And the Court adds: The rule rests also on grounds of great public "utility and convenience, in facilitating the exchange of prop- "erty, in simplifying its ownership, and in freeing it from "embarrassments, which are injurious, not only to its pos- "sessor, but to the public at large."

San Luis Water Company vs. Estrader, 48 Pac. 1075. Here, too, a franchise was granted to certain individuals to furnish water to a town when the law of California was similar to that of Idaho. The individuals transferred the right to a corporation. The precise point was made that the owner of such a franchise could not transfer it to a corporation, not because of want of power in the owner, but because a corporation was a person of such nature that it could not thus obtain such a power or grant. After discussing the nature and powers of a corporation and the nature of the franchise and the authorities cited, the Court on page 1078 concludes:

"The grant to Benrimo and his associates was also to their
"assigns. There can be no doubt but that they might, by
"the terms of the grant, sell or assign the franchise. It seems
"to me too plain to require argument that the purchase by the
"plaintiff was strictly and directly within its powers and
"contributed necessarily and directly to its objects and pur-
"poses."

People vs. Stanford, 77 Cal. 360.

This case holds that a corporation may acquire franchises granted to individuals and the franchise in question was that of operating a street car system in a city, collect tolls, etc.

State vs. Western I. C. Company, 10 Am. St. Rep. 166.
Spring Valley Water Works Co. vs. Schottler, 110 U. S. 347; L. Ed., Book 28, p. 173.

In this case Justice Field has a dissenting opinion and we call attention to a portion of his argument and his citations and quotations, which none of the Justices would dissent from, found on page 182, book 28, Co-op. edition. Here the learned Judge by quotations from decisions of that Court draws the line of distinction between "*corporate rights*, privi-
"leges and immunities derived directly from the State and so
"kept under State control" and those "rights and interest ac-
"quired by the company, not constituting a part of the con-
"tract of incorporation," and which "stand on a different foot-
"ing." That in respect to these latter "the State has no con-
'trol." After stating what the State might do under the power it reserves in chartering corporations, the learned Judge adds: "But whatever property the corporation acquires in
"the exercise of the capacities conferred, it holds under the
"same guaranties which protect the property of individuals
"from spoliation. It cannot be taken for public use without
"compensation; it cannot be taken without due process of
"law; nor can it be *subjected to burdens* different from those

"laid upon the *property of individuals under like circum-"stances."*

The learned Judge then quotes from an opinion of Judge Cooley in Detroit vs. Plank Road Co., 43 Mich. 140, in which quotation are these words: "And it cannot be necessary at "this date to enter upon a discussion in denial of the right of "the government to take from either individuals or corpora-"tions any property which they may rightfully have acquired. " * * * It is immaterial in what way the property was "lawfully acquired, whether by labor in the ordinary voca-"tions of life, by gift or descent, *or by making profitable use "of a franchise granted by the State; it is enough that it has "become private property and it is then protected by the law of "the land."*

> Anoka Water Works, etc., vs. City of Anoka, 109 Fed. 580.
>
> Illinois Trust & Savings Bank vs. City of Arkansas City, 76 Fed. 271.

An interesting case in Circuit Court of Appeals, Eighth Circuit, one involving franchise to a water company, power to sell, nature of property, right and power of city, and one discussing almost all the questions involved in case at bar. In the opinion, on page 282, Judge Sanborn says: "In con-"tracting the water works to supply itself and its inhabitants "with water, the city is not exercising its governmental or "legislative powers, but its business or proprietary powers. "The purpose is not to govern the inhabitants, but to obtain " a private benefit for the city itself and its citizens."

> County of Scotland vs. Thomas, 94 U. S. 682; L. Ed. Bock 24, p. 219.

Here the power of counties to subscribe for stock in a domestic railroad corporation was held to be a right and privi-

lege belonging to a foreign corporation into which the domestic corporation had been merged. That this power of the municpal bodies was a right and privilege of the corporation "passed with its other rights and privileges into the new "conditions of existence which the company assumed under "the consolidation."

Leathers vs. Janaey, 6 L. R. A. 661.

Louisville trust Co. vs. City of Cincinnati, 76 Fed. 296. On page 299 the Court says: "The grant of a right to enter "upon and occupy a public street with the necessary tracks, "poles, wires, and equipments of an electric street railway is "a grant of a typical easement in property, and as such is a "contract right capable, in the absence of express restrictions, "of being sold, conveyed, assigned or mortgaged, and is, "therefore, a right entitled to all the protection afforded other "property or contract rights."

Anoka Water Works vs. City of Anoka, 109 Fed. 580.
Walla Walla vs. Walla Walla Water Co., 172 U. S. 1; L. Ed., Book 43, p. 341.

In this case many of the questions involved here are discussed and the contract right and property right is held inviolable.

City Railway Co. vs. Citizens Street Railway Co., 166 U. S. 557; L. Ed., Book 41, p. 1114.

On page 1116 the Court says: "The grant when made "binds the public and is directly or indirectly the act of the "State. The easement is a legislative grant, whether made "directly by the Legislature itself, or by any one of its prop- "erly constituted instrumentalities." And on page 1118 the Court says: "It is universally held that a previous request "for an ordinance obviates the necessity of a subsequent ac-

"ceptance." The ordinance of the Eastmans was ordained on their request.

Africa vs. Board of Mayor, etc., 70 Fed. 729.

As to the fact that a contract and ordinance made with and to individuals may be assigned to a water company corporation and that the company takes it the same as in hands of the individuals to whom grant was made, very much in point is the case of the Bellevue Water Co. vs. City of Bellevue, 35 Pac. 693. This is an Idaho case.

In March, 1897, the city of Bellevue passed an ordinance granting to Young and his associates a franchise to lay pipes in its streets to supply it and its inhabitants with water, and therein agreeing to pay for water for *fire purposes.* In February, 1887, the Legislature passed the act adopting the Revised Statutes of 1887, in which is said chapter V of title IV, containing said sections 2710, 2711 and 2712, section 2711 being the one providing that such corporations must furnish *free water* for fire purposes.

After the act was in force the Bellevue Water Company was formed and organized and to it was sold and transferred the contract and franchise granted by the city of Bellevue to Young and his associates. For some years the city paid for water for fire purposes, but in 1890 and the following three years the city took the ground that, as the water company was such a corporation as was described in sections 2710, 2711 and 2712, and was formed under that act, that by its nature and the law of its creation, it must furnish free water for fire purposes. The Court held that the water company had the same rights as had Young and his associates; that the contract, not the nature of the company, governed.

City of Boise vs. Artesian Hot & Cold Water Co., 39 Pac. 562.

In this case in the Supreme Court of Idaho, the city took the ground that the water company must furnish the city with water for fire purposes free of charge under this very sec. 2711, because it was a corporation organized under the laws of daho and was furnishing water to the inhabitants of the City.

In short, that, because of the nature and business of the corporation, this obligation was upon it. But the Court held that, as it did not appear that the water company was acting under section 2710, the complaint stated no cause of action. In other words, the Court held that the fact that the water company was a corporation formed to supply water to the city and to the inhabitants thereof, did not of itself bring the water company within the provisions and obligations of sec. 2711. And that to do this it must also appear that the company by ordinance or by contract be brought under section 2710.

No doubt, under advice of counsel, and to get around this decision, the city passed ordinance 304, pretending to grant to the water company in April, 1900, a grant and franchise to lay pipes and furnish water; an ordinance passed after the company had been acting under the Eastman grant for about ten years and an ordinance rejected by the water company at once.

This Idaho case, it seems to us, disposes of the contention of defendant that because plaintiff and its immediate predecessor was a water company corporation, it must be under this obligation to furnish free water, whether or not it had

obtained, or any corporation predecessor had obtained such grant and franchise from the city as is mentioned in said sections 2710 and 2712. In short, that the nature of the contract and property right govern, not nature of the owner of the water works as to whether a natural or an artificial person.

City of New Orleans vs. Great South Telephone & Tel. Co., 21 Am. & Eng. Corp. Cases, 35.

Here the city attempted to create or add an additional burden upon a corporation using its streets, in additon to what was in the grant, which the predecessor of the corporation had accepted and acted upon. Court held city had no such power.

Right and power of water company, *jus desponendi*.

Had the water company corporations, which were successors of the Eastmans and predecessors of plaintiff, the same right and power to sell as had the Eastmans? Could they sell both the water works and all properties and property rights appertaining to the water works, including this easement, grant and secondary franchise obtained from the city?

The position of defendant is that neither of these Idaho corporations could sell or dispose of all these properties and property rights. Defendant says they were *quasi* public corporations and therefore could not disable themselves from performing their public duties by sale of all their property.

Section 163, 1 Vol. Clark & Mar. on Private Corp., p. 444, says: "A corporation cannot, without express authority from "the legislature, transfer or mortgage its franchise to be a cor- "poration, for this would result in the creation of a corpora- "tion without the consent of the Legislature. Nor * * *

"can a quasi public corporation transfer the franchises or special privileges other than the franchise to be a corporation "conferred upon it by its charter, * * * unless such "transfer is expressly authorized by the Legislature." And to this the author cites very many cases. Then, on page 446, the author says in speaking of this doctrine: "But in some "States it has been criticised and even disregarded." Cites very many authorities. It will be noticeable that the author described a different franchise from that received by the Eastmans in two essential respects; he speaks of franchises "*conferred upon it by its charter.*" Now, in Idaho the corporation is complete and fully organized without this franchise of use of streets or right to furnish water to inhabitants, and, as we have seen, our Supreme Court so held in effect. Second, the franchise we have operated under was never granted by the city to any corporation, but to individuals, who accepted it, expended money on faith of it, and then sold it to a corporation with their other water works properties as by the terms of the grant they might do. In our opinion, there is no such great diversity in the decisions of courts as the said author seems to imply. We have seen no case where it has been held that such a franchise as was granted to the Eastmans it not property and as such is not transferable. It is the distinction between a corporate franchise and a franchise of a corporation which the author does not here seem to make. No doubt defendant relies on a class of cases like that of Oregon R. R. & Nav. Co. vs. The Oregonian R. R. Co., 130 U. S. 1.; Law. Ed. Book 32, 837. Here the Court were considering a *corporate franchise* and *corporate* property and *those without which* the road could not perform the functions for which it was created. It could not operate a road or act

as a railroad company if it had not the particular road and the only road it was created to operate, and yet it claimed to continue to exist for another purpose—that of being lessor of railroads, when no such lessor corporation was known to the laws of Oregon. And the Court calls attention to the fact that the transfer of all this property was not attempted to be made in view of a dissolution which it might effect voluntarily, but was made in view of continuing its existence in another capacity from that for which it was created.

Now, in the case at bar, as we have attempted to show, the sale was of property and franchise not necessary to the existence or the operation of the company. The corporation was no more formed to own and operate the Eastman water works and franchise than it was to own and operate the Sonna water works and franchise or any other property and franchises. And, moreover, under a statute permitting voluntary dissolution with the approval of the State through its judicial department, in the case at bar, the sale was made in view of dissolution which was immediately proceeded upon effected and approved by decree of court, long prior to the bringing of this action. The Idaho Company with consent of the State ceased to exist soon after the sale of all of its property and the plaintiff is its successor with, under the Idaho Constitution and laws, all the rights, privileges and powers of an Idaho corporation, and is, no doubt, under like duties and obligations. We are not claiming any immunities on account of being a foreign corporation.

We claim that so far as property was concerned the corporation which succeeded to the ownership of the water works and franchise (if it can be called a franchise) of the Eastmans had the same absolute *jus disponendi*, as had the Eastmans.

None of these (our predecessors) corporations received anything from the State except existence and power to act as a corporation. The properties disposed of including the incorporeal and intangible property and privilege granted to the Eastmans by the city were not indispensably necessary to their existence as such a corporation, or to their operating and acting as a water company formed to supply water to the city and its inhabitants.

The status of a railway corporations and of some other *quasi public* corporations which have received from the State itself important powers and were incorporated to operate a particular line of road is far different from the status of any of the successors of the Eastmans and essentially different in the very respect mentioned in the decisions as the grounds for holding in many cases that such corporations could not alienate all their properties and abandon duties they owed to the State.

> State vs. Western Irrigating Canal Co., 40 Kans. 96; 10 Am. State Rep. 166.
>
> Willamette Woolen Mfg. Co. vs. Bank of British Columbia, 119 U. S. 191; Law. Ed. Book 30. 384.

We quote, "But there were franchises created by the act "of incorporation which would be of no value to the pur- "chaser, which in the nature of things, could not be trans- "ferred to it. Obviously among these was the right to exist "as a corporation. The sale under the decree of foreclosure "did not annihilate the Willamette Woolen Mfg. Co. so that 'it no longer had any existence. Nor was its power to make "contracts, to sue and be sued, to have a common seal, to "buy other lands and sell them, to make by-laws and do many "other things which an incorporated body can do * * *

"nor is it at all clear that, if it had sold outright the prop-
"erty which it mortgaged to this company it would not still
"have the right to take other water from the Lasstian River
"and conduct it to other mills and other places for the purpose
"of manufacturing, provided it did not interfere with or
"limit the water and use of the water it had sold."

The above corporation was created by a special law and given special rights and privileges, and while not a *quasi public* corporation as to its business, yet it was created for public corporation as to its business, yet it was created for a special purpose and given special privileges and great powers including right of eminent domain, and the right to the waters of a certain river. As to its nature it was from the State with powers of the State and waters of the State.

The case at bar is one where the business is of a public nature, but the nature of the corporation of none of the successors of the Eastmans has been *quasi public*.

None of them received anything from the State except birth and life. Our statute makes them "private corporations;" after organization under one chapter of our laws, such corporation could, perhaps, under another chapter have developed into a *quasi public* corporation by securing from the city a franchise of use of its streets for furnishing water to its inhabitants and thus indirectly obtaining such franchise from the State, and so by operation of the two chapters, and its own, and, the city's govermental, acts, become a *quasi public* corporation owing duties to the State. And this would be by regarding the granting such franchise of its streets for such purposes as acting in a governmental capacity and as a part of the State government, rather than as acting in its proprietary capacity. But even this is against the weight of authority. As a matter of fact, these corporations received

nothing from the State but existence, which they have surrendered back to the State with its permission, they are dissolved by decree of the Court. They never owed duties to the State as corporations—no duties regarding their said properties more than or different from those owed by the Eastmans while owning the same properties, and this in like manner, and no different from those owed by Mr. Sonna, who is now using like properties in like manner under like grant from the citly. This is in harmony with the decision of the Idaho Supreme Court, in 39 Pac. 566, when it held that there is neither duty nor right to furnish water for fire purposes unless under contract or ordinance of the city.

The case of the Central Transportation Co. vs. Pullman Palace Car Company, 139 U. S. 24; Law. Ed. Book 35, p. 55, is a leading case of the class of cases on which defendant must rely. This case reviews the former cases decided by the Supreme Court and by apt quotations calls attention to the essential and distinguishing characteristics of the cases where it is held that all the properties and franchises could not be alienated. It was a case where suit was brought on a contract leasing the propeties and franchises of the corporaiton for ninety-nine years to another corporation and in the contract the lessor agreed not to do the business for which it was chartered, during that time, and to do no business except to receive and distribute the rents.

And the Court says: "The plaintiff, therefore, was not an "ordinary manufacturing corporation such as might, like a "partnership or individual engaged in manufacture, sell or "lease all its property to another corporation. Ardesco Oil "Co. vs. North American Oil & Min. Co., 66 Pa. 375. Tread-"well vs. Salisbury Mfg. Co., 7 Gray 393. But the purpose "of this incorporation, as defined in its charter, and recog-

"nized and confirmed by the Legislature, being the transpor-
"tation of passengers, the plaintiff exercised a public employ-
"ment, and was charged with the duty of accommodating the
"public in the line of that employment, exactly correspond-
"ing to the duty which a railroad corporation or a steamboat
"company, as a carrier of passengers, owes to the public in-
"dependently of possessing any right of eminent domain. The
"public nature of that duty was not affected by the fact
"that it was to be performed by means of cars constructed
"and of patent rights owned by the corporation, and over
"roads owned by others. The plaintiff was not a strictly
"private, but a *quasi public* corporation; and it must be so
"treated, as regards the validity of any attempt on its part
"to absolve itself from a performance of those duties to the
"public, the performance of which by the corporation itself
"was the remuneration that it was required by law to make to
"the public in the terms of the grant of its franchise.
" * * * The evident purpose of the Legislature, in
"passing the statute of 1870, was to enable the plaintiff the
"better to perform its duties to the public, by prolonging its
"existence, doubling its capital, and confirming, if not en-
"larging, its powers. An intention that it should immedi-
"ately abdicate those powers and cease to perform those du-
"ties, is so inconsistent with that purpose that it cannot be
"implied without much clearer expressions of the legislative
"will, looking towards that end, than are to be found in the
"statute. But the road and franchises are generally inalien-
"able, and they are so, not only because they are acquired by
"legislative grant, or any exercise of special authority, given
"for the specific purposes of the incorporating act, but be-
"cause they are essential to the fulfillment of those purposes;
"and it would be a dereliction of the duties owed by the cor-
"poration to the State and to the public to part with them."

And the Court, quoting from other decisions, says: "The
"rights, duties and obligations of the defendant are defined
"in the acts of the Legislature of Indiana under which they
"were organized, and reference must be had to these, to ascer-
"tain the validity of their contract. They empower defend-
"ants respectively to do all that was necessary to construct
"and put in operation a railroad between the cities which are
"named in the act of incorporation. There was no authority

"of law to consolidate these corporations, and to place both "under the same management, or to subject the capital of "the one to answer for the liabilities of the other; and so the "Courts of Indiana have determined. * * * The powers "are conceded in consideration of the advantage the public "is to receive from their discreet and intelligent employment, "and the public have an interest that neither the managers nor "stockholders of the corporations shall transcend their au- "thoity." "Important franchises were conferred upon the "corporation to enable it to provide the facilities to communi- "cation and intercourse required for the public convenience. "Corporate management and control over these were pre- "scribed, and corporate responsibility for their insufficiency "provided, as a remuneration to the community for their "grant. The corporation cannot absolve itself from the per- "formance of its obligation without the consent of the Legis- "lature."

The contrast to above and that which distinguished the case at bar is described by the Court in the case of Miner's Ditch Company vs. Zellerbach (99 Am. Dec. 307). In the words "of this class are railroad, turnpike and canal com- "panies and corporations strictly private, the direct object of "which is to promote private interests and in which the public "has no concern, except the indirect benefits resulting from "the promotion of trade and the development of the general "resources of the country. They derive nothing from the "government except the right to be a corporation, and to "exercise the powers granted. In all other respects, to the "extent of their powers, they stand upon the footing of natural "persons, having such property as they may legally acquire, "and holding and using it ultimately for the exclusive benefit "of the stockholders."

"Ownership of property, whether real or personal, carries "with it the same general power of disposition, in corporations "as in individuals, except where the power is restrained by "statute or by considerations of public policy." Angel & Ames on Corp., sec. 187.

Leathers vs. Janney, 6 L. R. A. 661.

In White Water Valley Canal Company vs. Vallette, 62 U. S. 414; Law. Ed. Book 16, p. 158, Justice Campbell says: "It is well settled that a corporation, without special authority, may dispose of lands, goods and chattels or of any interest "in the same, as it deems expedient, and in the course of their "legitimate business may make a bond, mortgage, note or "draft; and also make compositions wth creditors, or an as-"signment for their benefit, with preferences, except when re-"strained by law."

The doctrine that a *quasi public* corporation cannot transfer its properties and franchises is fully expressed by Mr. Justice Miller in Thomas vs. Railroad Company, 101 U. S. 71; 25 Law. Ed. 950, in these words: "Where a corporation "like a railroad company has granted to it by charter a fran-"chise intended in a large measure to be exercised for the "public good, the due performance of those functions being "the consideration of the public grant, any contract which "disables a corporation from performing those functions—"which undertake without the consent of the State to trans-"fer to others the rights and powers conferred by the charter "and to relieve the grantees of the burden which it imposes—"is a violation of the contract with the State and is void as "against public policy. This dostrine is asserted with re-"markable clearness in the opinion of this Court delivered by "Mr. Justice Campbell in Railroad Company vs. Winans, 17 "How. 330, * * * 'this conclusion (argument) implies " 'that the duties imposed upon plaintiff by the charter are ful-" 'filled by the construction of the road, and that by alienating " 'its right to use, and its powers of control and supervision, " 'it may avoid further responsibility. But those acts involve " 'an overturn of the relations which the charter has arranged " 'between the corporation and the community. Important " 'franchises were conferred upon the corporation, to enable " 'it to provide facilities for communication and intercourse " 'required for public convenience. Corporate management " 'and control over these were prescribed and corporate re-" 'sponsibilities for their insufficiency provided as a remunera-" 'tion to the community for their grant. The corporation " 'cannot absolve itself from the performance of its obliga-" 'tions without the consent of the Legislature.' "

The rule depends upon the reasons for the rule. In the case at bar none of these reasons exists. Here the corporations to whom the Eastmans sold their water works and rights and privileges and all pertaining thereto received nothing from the State that they have not returned back to the State, and the same has been accepted by the State. They got nothing by their charter but the right to exist and do business as such corporation. The franchise of laying and maintaining pipes in the streets, if franchise it can be called, the State did not grant and could not grant, but the State empowered the city to grant such franchises and the city did so in its proprietary capacity as agent for its inhabitants and granted it with the right of assignment to their successors.

There is a sense in which the corporate franchises are not the property of the corporation. The franchise of existence and power to do business is the property of the stockholders, not of the corporation. A corporate franchise enters into and is a part of the franchise of incorporation. It comes from the State and is not the property of the corporation, but its life-blood.

Other franchises are in the nature of property, are not received from the State and, as was said in Leathers vs. Janney, 6 L. R. A. 661, "No law prevents a corporation from "selling any or all of its property, provided the charter con- "tains no prohibition thereof, and it acts in accordance with "the duly expressed will of its stockholders and directors."

And in the same case, "The same person may fill the office "of treasurer of two distinct corporations, and such identity "does not of itself invalidate dealings between the two cor- "porations."

The Common Law powers of a corporation are the same as those possessed by individuals and may be employed in

the same manner unless restricted by some positive or clearly implied prohibition of law. DeGroff vs. American Linen Thread Co. 21 N. Y. 124. Williams vs. Wala Walla Tel. Co. 9 Abb. N. C. 443. Barry vs. Merchants' Exchange Co., 1 Sandf. Ch. 280. White Water G. C. Co. vs. Vallette, 62 U. S. 414. (Here see cases cited in note 6 L. R. A. p. 661.) In Klosterman vs. Mason County Central R. R. Co., 36 Pac. 136, the Supreme Court of Washington had occasion to pass on a transfer of the property and franchise of a corporation. The powers of corporations to dispose of "property both real "and personal" are the same as in Idaho and the Washington Constitution has the same section as the Idaho Constitution providing that in case of lease or sale the property or franchises are not relieved from any burden. The Court says, 138, "In this case there is no showing that the appellant cor-"poration ever acquired any of its property except by pur-"chase; and, under these circumstances, it was under no obli-"gations to the public to retain its property, or to continue "its business, longer than it deemed expedient to do so. In "other words, no one but its creditors had the right to ques-"tion the disposition of its property. The statute, as we have "seen, conferred upon it the power to dispose of its property, "both 'real and personal,' and the Constitution would seem "to imply a right even to dispose of its franchise, but not in "such a manner as to relieve the franchise, or property held "under it, from certain liabilities of the grantor. Const. "Art. 12, Sec. 8.

"The learned counsel for the respondent and the inter-"venor insist that, by virtue of the above cited provision of "the Constitution, the property in question is still subject to "the claim of the respondent. But we are not of that opinion. "That provision declares, in effect, that, if a corporation shall "release or alienate its franchise, neither the franchise, nor "property held thereunder, shall thereby be relieved from lia-"bility contracted or incurred in the operation, use or enjoy-"ment of such franchise, or any of its privileges. This is

"but a declaration of what the Courts have generally held to "be the law, irrespective of the constitutional limitations or "provisions."

Bigelow J. in Treadwell vs. Salisbury Mfg. Co., 7 Gray 393, says: "Nor can we see anything in the proposed sale to "a new corporation, and the receipt of their stock in payment, "which makes the transaction illegal. It is not a sale by a "trustee to himself for his own benefit, but it is a sale to an-"other corporation for the benefit and with the consent of "the *cestuis que* trust, the old stockholders. The new stock "is taken in lieu of money to be distributed among those stock-"holders who are willing to receive it, or to be converted into "money by those who do not desire to retain it. Being done "fairly and collusively, as a mode of payment for the prop-"erty of the corporation, that transaction is not open to a "valid objection by a minority of the stockholders. Hodges "vs. New England Screw Company, 1 R. I. 347 (53 Am. "Dec. 624)."

"The Banks vs. Portiaux, 3 Randolph, 136; 15 Am. Dec. "706. *'Jus disponendi* in corporations: Ownership of " 'property, whether real or personal, carries with it the same " 'general powers of disposition as in individuals except where " 'that power is restrained by statute or by considerations of " 'public policy.' Angel and Ames on Corp. sec. 187. It "may, therefore, in the absence of such restraint, sell what-"ever it has a right to own."

Arthur vs. Commercial Railroad Bank of Vicksburg, 9 Smedes & Marshal, 394.

Treadwell et al. vs. Salsburg Manf'ct. Co. 7 Gray, 393.

McClutcheon vs. Mez Capsule Co., 71 Fed. 787.

In this case the Court holds that if a corporation purposes to wind up its affairs and go out of business, it may sell all its property, but that it may not sell its property and agree not thereafter to do the business it was created to do unless it is

to be dissolved. It may not be a corporation within a corporation.

Homes & Griggs Manf. Co. vs. Homes & Wesset Metal Co., 127 N. G. 252, 27 N. G. 831.

Merz Capsule Co. vs. U. S. Capsule Co. 69 Fed. 414.

Baltimore Trust Co. vs. May & City, 64 Fed. 153.

City of Cleveland R. R. Co. vs. City of Cleveland, 94 Fed. 385.

Illinois Trust & Savings Bank Co. vs. City of Arkansas, 76 Fed. 271.

Capital City Light Co. vs. City of Des Moines, 72 Fed. 829.

Workman vs. Southern P. R. Co., 62 Pac. 185.

City of Los Angeles vs. Los Angeles Water Co., 57 Pac. 210.

Eddy on Combinations, Vol 2, secs. 1105, 1106, 1107 and 1110.

Dell on Mun. Corp. (4th Ed.), secs. 68a, 691 and 697, and cases cited under sec. 68a on p. 115.

The grant to the Eastmans, and to "their successors in interest in their water works," gave to the Eastmans power to have and choose their successors. Powell vs. McGuire, 43 Cal. page 21, the Court says: "When the Legislature "grants a franchise to a particular person, his associates and "assigns, it delegates to him the right to select the person "thereafter to be associated with him in the enterprise."

The Eastmans obtained from the city a franchise of no value unless it carried with it the right to use the water pipes when laid.

Sullivan vs. Lear, 11 Am. State Rep., 388. On page 390 the Court says: "The franchise of the bare right to do a "thing considered with reference to itself is of no value. It "is only when it is considered relatively and in connection "with its use that it can be said to be valuable."

National Water Works vs. Kansas City, 65 Fed. 601.

Southwest Mo. Light Co. vs. City of Joplin, 113 Fed. 871.

Foster vs. Frankling L. & V. Turnpike Road Co., 65 S. W. Rep. 840, 15 Am. & Eng. Corp. Cases (new series), 858.

This case shows the Eastmans had the absolute right to sell to *any* person who would buy and that an act of the Legislature requiring them to sell to certain persons would have been void as against their contract and property rights.

Lake View Land Co. vs. San Antonio Traction Co., 66 S. W. Rep. 766, Am. & Eng. Corp. Cases (new series), 1.

People *ex rel* City of Pontiac vs. Central Union Tel. Co., 61 N. E. Rep., 15 Am. & Eng. Corp. Cases (new series), 416.

We admit that *quasi public* corporations, which have received from the State not only their corporate existence but important powers and special privileges and have duties and trusts

imposed upon them by the State, corporate in nature, cannot alienate their property and franchises necessary to perform such duties; as stated by Clark & Marshall on Corporations, section 162a: "They cannot sell or lease their corporate "powers and privileges and thereby disable themselves from "performing their public duties without legislative authority."

Our predecessor corporations got from the State existence only, and no powers or privileges, corporate or otherwise, except it be the power to do business, and all they received from the State they held, until, by consent of the State, they surrendered them back to the State and ceased to exist. They sold nothing received from the State. The franchise that entered into and became a necessary and inseparable part of their properties came to them with the property, and went from them with their properties, necessarily, and was, by its express terms, to go to "their successors in interest", in the property.

All that the Legislature of the State could take from our predecessor corporations has been surrendered to the State and accepted by the State. It could alter, amend or repeal their charter, but it had no power over the vested rights of property—no power over anything transferred to us. Clark and Marshall on Corporations, section 276.

The case of the Detroit Citizens Street Railway Company vs. Detroit, reported in 64 Federal 628, 26 L. R. A. 667, decided by Circuit Court of Appeals, 6th Circuit, is one very closely in point in the case at bar, and discusses many questions nvolved in this cause. Here the city had granted an easement, or franchise (both terms are used) to the predecessor in interest in the properties of plaintiff for a term of years

greater than the term for which the corporation grantee could exist.

The Court summarizes the opinion of the Circuit Court under review (Detroit vs. Detroit City R. R. Co., 55 Fed. 569) as follows: "The Circuit Cout held as follows: '(1) " 'That the power to make the grant relied on by defendants " 'in this case must be found in the train or street railway " 'acts, or not at all.

" '(2) That the power conferred by those acts to grant " 'an easement in the streets to the street railway company is " 'not an express, but an implied power.

" '(3) That "a power implied must be limited to the " ' "necessity that gives rise to its implication."

" '(4) That "an inevitable limitation thus arising in that " ' "the easement shall not endure beyond the life of the fran- " ' "chise for which this easement was given."

" '(5) That the corporate life and corporate franchises " 'originated under a general law which limited their continu- " 'ance to a period of thirty years.

" '(6) It therefore followed that the power of the city " 'was limited to the grant of an easement of way in the " 'public streets not exceeding in duration the corporate life " 'of the company receiving the grant.

"The very eminent counsel for the city have, in addition to "the points of the decision stated, argued very strenuously "that, irrespective of the capacity of the city to make the grant "in question, it was not within the corporate power of the "Detroit City Railway Company to receive a street franchise "for a term extending beyond its corporate franchise. *We "cannot at all agree to this proposition. The duration of any "estate which such a corporation may take must depend upon "the language of the grant and the power of the grantors to "make it.*

"It was an incident at Common Law to every corporation "to have a capacity to purchase and alien lands and chattels "unless they were especially restrained by their charter or "statute." 2 Kent, Com. 281, 282.

The same author says: "Corporations have a *fee simple* "*for the purpose of alienation,* but they have only a determin-"able fee for the purpose of enjoyment. On the dissolution "of the corporation, the reverter is to the original grantor "or his heirs; but the grantor will be excluded by the aliena-"tion in fee, and in that way the corporation may defeat the "possibility of a reverter."

"If real or personal or negotiable contracts are conveyed "to a corporation, subject to no condition, the company has "the right to convey the same absolutely, and in such case "the title of the purchasor will not be affected by the sucse-"quent dissolution of the corporation." Morawetz Private Corporations, secs. 330, 1031; Nicoll vs. New York & E. R. Co., 12 N. Y. 121; State vs. Rives, 27 N. C. 305-309; People vs. O'Brien, 111 N. Y. 13, 2 L. R. A. 255; Omaha Bridge Cases, 10 U. S. App. 192, 2 C. C. A. 174, 51 Fed. Rep. 309.

The case last cited was where a lease of trackage and bridge right was made to a railroad company for 999 years, which had only a corporate life for forty years.

In People vs. O'Brien, cited above, the instance was that of a grant of an easement, in the streets of New York, unlimited as to time. The grant of street rights had been made by the city of New York in perpetuity to a street railway company having a corporate life limited to one thousand years, but subject to reserve right of amendment, alteration, or repeal. The grant was made by authority conferred by an amendment to the Constitution of the State, adopted 1875, which prohibited the enactment of any law which should authorize "the "construction or operation of a street railway except upon "condition that the consent of the owners of one-half in value "of the property bounding on, and the consent also of the "local authorities having the control of that portion of the "street or highway upon which it is proposed to construct or "operate such road be first obtained." N. Y. Const., Art. 3,

section 18. The Court of Appeals of New York in a most elaborate opinion held:

(1) That the "*consents*" *obtained* "*were the muniments* "*of title to the enjoyment of the rights acquired thereunder by* "*the railroad company,*" and *constituted a property interest which was not destroyed by the repeal of the charter.*

(2) That there was no limitation upon either the power of the city to grant an easement in perpetuity, extending beyond the prescribed life of the corporation, nor did such limitation operate to limit the power of the corporation to receive such a grant. The Court said, as to the duration of such a grant, that "this is to be determined by a consideration "of the language of the grant and the extent of the interest "which the grantor had authority to convey. We think this "question has been decided by cases in this Court, which are "binding upon us as authority in favor of the perpetuity of "such estates. That a corporation, although created for a "imited period, may acquire title in fee to lands or properties "necessary for its use, as decided in Nicoll vs. N. Y. & E. R. "Co., 12 N. Y. 121, where it was held that a railroad corpor-"ation, although created for a limited period, might acquire "such title, and that, where no limitation or restriction upon "the rights conveyed was conveyed in the grant, the grantee "took all the estate possessed by the grantor. The title to "streets in New York is vested in the city for the people of "the State, but under the Constitution and statutes it had "authority to convey such title as was necessary for the pur-"poses of corporations desiring to acquire the same for use "as a street railroad. The city had authority to lim[illegible] "estate granted, either as to the extent of its use or the time "of its enjoyment, and also had power to grant an interest "in the streets for public use in perpetuity which should be "irrevocable. Yates vs. Van De Bogert, 56 N. Y. 526; "*re* N. Y. Cable R. Co. 109 N. Y. 32. Grants similar in all "material respects to the one in question, have before been "before the Courts of this State for construction; and it has "been quite uniformly held that they vest the grantee with "an interest in the streets in perpetuity for the purpose of a

"street railroad. People vs. Sturtevant, 9 N. Y. 263, 59 Am. "Dec. 536; Davis vs. N. Y., 14 N. Y. 506, 67 Am. Dec. 186; "Milhau vs. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; N. Y. "vs. Second Avenue R. R. Co., 32 N. Y. 361; Sixth Ave- "nue R. R. Co. vs. Kerr, 72 N. Y. 330. Other cases are "also reported in the books, but it is deemed unnecessary to "accumulate authorities on this point."

"We are clearly of the opinion that the power of the De- "troit City Railway Company was not restricted to the taking "of such a grant for a term limited by its corporate life.

"The fact that it could not personally enjoy the interest "thus granted after the expiration of its substantial and cor- "porate franchises would not cut down the estate granted. "Its power of alienation was unaffected, and its assignee, "if otherwise endowed with the franchises essential to the "operation of a street railway, might enjoy the rights and "privileges derived by assignment. The duration, character "and extent of an estate conveyed to a corporation must be "determined by the terms of the grant, unless there be an ex- "press prohibition in its organic law, or one imposed by "statute. Angel & Ames Corporations, sec. 195; State vs. "Rives, 27 N. C. 305-309; Asheville Division No. 15, Sons "of Temperance vs. Ashton, 92 N. C. 579; State vs. Laclede "Gaslight Co., 102 Mo. 472 and 487; Gere. vs. N. Y. & Hud- "son Railway Co., 19 Abb. N. C. 193, 203, and cases cited above. There is nothing in the nature of a property right "involved in a grant of easement in the streets for street "railway uses which distinguishes it from other property "acquired by a corporation in the exercise of its franchises; "but it by no means follows that, because the street railway "company had the capacity to take an easement in the streets "for a term extending beyond its corporate franchises, the city "had the power to make such a grant."

And as to power of city to grant such easements, the Court says: "If the use of the streets for street railway purposes "is a legitimate use, then it must follow that the general "powers vested in the city by its charter 'to open, close and "'widen streets,' and 'to prescribe, control and regulate the "'manner in which the highways, streets, avenues,' etc., "'shall be used and enjoyed,' is a power broad enough to

"permit the city to consent to the use of its streets for such "purposes by any company having the requisite franchises of "a street railway company. Judge Dillon, in his work on "Municipal Corporations (sec. 575), in summing up his con- "clusions with respect to the general charter powers of muni- "cipalities over their streets as affecting the power to grant "permission for such use of streets by street railways, says: " 'The ordinary powers of municipal corporations are usu- " 'ally ample enough in the absence of express legislation on " 'the subject to authorize them to permit or refuse the use " 'of streets within their limits for such purposes.'

"Upon a full consideration of the subject, the Supreme "Court of Kansas, in the case of Atchison vs. Missouri Pa- "cific R. R. Co., 31 Kan. 601 (the opinion being by Judge "Brewer, now Associate Justice of the Supreme Court), came "to the same conclusion. Bearing on the same question are "the cases of Brown vs. Duplessis, 14 La. Ann. 854; State "vs. Corrigan Consol. Street R. R. Co., 85 Mo. 274, 55 Am. "Rep. 361; Davis vs. Mayor, etc., N. Y., 14 N. Y. 506, 67 "Am. Dec. 186."

The Court then cites from the Constitution and laws of Michigan and comes to the conclusion that it is the policy of the State Constitution to place control of streets in the local municipalities, that the Legislaure could not grant such easements in streets, that it is a local matter. And the Court says: "However this may be, we are of the opinion that "these acts do directly confer power to consent to such use of "the streets, and that, when such consent is once given and "accepted, it is irrevocable for the term fixed by the grant. "The power to consent is in and of itself the power to grant "an easement. The 'consent' is an easement, and the act of "consenting to the use of the streets for street railway pur- "poses is the act of granting an easement in the streets. Con- "sent to such use of streets constitutes a typical easement, "and the right granted thereby is an interest in reality, being "an incorporeal hereditament. Whether this easement is "subject to revocation, or is in perpetuity, or for a term of "years, may depend upon the terms of the ordinance, or the

"further terms of the act conferring the power to grant "consent.

"What the Legislature meant by the 'consent' it intended "the municipality should grant if it saw fit is illustrated by "section 10 of the Train Railway Law. That section per-"mitted such companies to enter upon and condemn, under "the State's right of eminent domain, a right of way a hun-"dred feet in width, but limited this right by prohibiting the "location of such road 'through an orchard or garden with-" 'out the consent of the owner thereof.' This did not in any "true sense make the operation or exercise of the franchise "granted dependent upon the owner of the orchard or gar-"den. It simply said to such companies: 'We grant you " 'the power to enter upon and condemn a right of way; but " 'if, in the exercise of your franchise, you wish to locate " 'your road through an orchard or garden, this power shall " 'not be taken to authorize you to locate your road through " 'such orchard or garden without you obtain the owner's " 'consent—that is, unless you, by agreement, obtain an ease-" 'ment from the owner.'

"It is not enough that the incorporators have obtained a "franchise to be an incorporation, nor that the corporation "has been endowed with power to operate a railroad, com-"mercial or street; but it must also acquire, from those own-"ing of controlling the property on or over which it is pro-"posed to run their road, a permission to occupy sufficient "land for that purpose. In this sense it may be said that "every railroad company having the requisite franchise to "acquire, own and operate such road, and not having the "power of eminent domain, is unable to exercise its franchise "to operate such a road until it shall first obtain the 'consent' "of those owning or controlling the land over which its road "must be constructed. But it is not true that either the fran-"chise to construct or operate a railway comes from the own-"ers of private lands or the municipal authorities controlling "the public streets. The right to construct and operate a road "through an orchard or garden or on the public streets is "dependent, in the first instance, upon the consent of the "owner of the orchard or garden, and, in the second, on the "consent of the local government controlling the public "streets. This consent or permission, whether it comes from

"the private owner, or the local government, is in all respects, "whether it be permanent or for a term of years, or at the will "of the one consenting, what the law denominates 'an ease- " 'ment,' the duration of which is dependent only upon the "extent of the interest the grantor had authority to grant, and "the terms of the consent itself. That the power, whatever "it may be, is not an implied power, it is obvious. The Leg- "islature, it must be remembered, did not have the power, "independently of the city, to grant to any company the right "to enter upon and occupy the streets of Detroit. Now, if "it had granted the right to enter upon a particular street "and occupy it for such purposes without in terms mentioning "the consent of the city, it will be agreed that there was an "implied power granted the city authorizing it to consent; "but when, as in these two acts, it is expressly provided that "the consent of the city must be first obtained, and then the "city proceeds to expressly state how that consent shall be "given—that the terms and conditions must be such as are "satisfactory to the city, and that, after such consent has been "given and accepted, the right, franchise or easement shall "not be destroyed or unreasonably impaired by any regula- "tions or conditions to be made thereafter by the city—it "seems too obvious for argument that a power is expressly "given.

"An express statement of the mode in which an implied "power is to be exercised, and an express statement of what "shall be its effect when exercised, is an inexplicable "anomaly."

These cases well illustrate the fact that not the *nature* of *the grantee* governs, but of the thing granted. The grantee may be a short-lived corporation, while the thing granted may be longer lived or in perpetuity.

We call attention to the fact that the Court and laws of Idaho are very similar in the respects noted by the Court to those of New York cited, and that in Idaho such consent, such easement, must be by the local authorities, and that these "consents" were muniments of title to the enjoyment of the rights acquired thereunder, and that the limitation stated in

the charter was not operative as a limitation upon the power of the city to grant an easement in perpetuity.

The case of San Luis Water Co. vs. Estrada, etc., 48 Pac. 1075, is a case where a grant was made by the Legislature to individuals, and such a grant as could not have been made at that time in California to a corporation. This grant to Benrimo and others was transferred to a private corporation. The Court says: "The precise point made is that the power "to supply the city with water cannot be conferred directly "or indirectly upon a private corporation by special act. By "act of the Legislature entitled 'An Act to provide for the " 'introduction of good and pure water into the town of San " 'Luis Obispo,' approved March 28, 1872, a certain franchise "was granted to M. A. Benrimo, C. W. Dana and W. W. "Hays. Section 1 grants to these persons and their assigns "exclusive right for twenty-five years to supply the inhabi- "tants of the town of San Luis Obispo with water. No "other authority to sell is given in terms. The plaintiff is "a corporation duly authorized under the laws of this State "June 4, 1875, and alleges that it became the owner through "mesne conveyences of said franchises about the same date "last mentioned."

The Court distinguishes the case from others relied upon by the defense and says: "When the act here in question "was passed, the corporation had no existence in fact, or, so far as we know, in expectancy, and it was not formed until "three years later, and it does not appear that any of the "original grantees of the franchise had an interest in the cor- "poration, or that they caused it to be formed. It seems to "me that the only question presented, therefore, is whether "the corporation duly formed to supply the town (now city) "of San Luis Obispo and the inhabitants thereof with water, "could, under any circumstances, purchase and become the "owner of this franchise. Appellants do not attack the valid- "ity of the franchise to Benrimo and associates, but they say "that the assignment to the corporation was illegal and void, "and the corporation could not hold or exercise it. The "plaintiff corporation to which the transfer was made was "formed for the purpose and object of furnishing the town of

"San Luis Obispo and the inhabitants thereof with pure, "fresh water, and has been so engaged since its organiza- "tion."

"Among the powers of corporations given by our statutes "are: ' * * * (4) To purchase, hold and convey " 'such real and personal estate as the purposes of the cor- " 'poration may require, not exceeding the amount limited in " 'this part. * * * (8) To enter into any obligation or " 'contract essential to the transaction of its ordinary affairs, " 'or for the purposes of the corporation.' Civil Code, sec- "tion 354. The grant to Benrimo and his associates was also "to their assigns. There can be no doubt but that they "might, by the terms of the grant, sell or assign the franchise. "It seems to me too plain to require argument that the pur- "chase by the plaintiff is strictly and directly within its pow- "ers, and contributed necessarily and directly to its objects "and purposes."

Board of Mayor, etc., of Morristown vs. East Tenn. Tel. Co., 115 Fed. 304, decided this year in the Circuit Court of Appeals, 6th Circuit, is a case in point both as to powers of the city to grant the franchise and also as to the grant being irrevocable after acceptance. And in this case the city also denied the authority of the company as a foreign corporation engaged in a competitive business to acquire the right and franchises of the local company, a domestic corporation. And, although the charter of the city did not in express terms deal with the question of the grant of privileges or franchises in the streets or provide in so many words that the city should have control over its streets, yet the Court held that it would not disagree with the Court below in holding that the powers in reference to streets and alleys were so numerous and sweeping as to be equivalent to a general power.

And the Court held that the consent to the occupancy of the streets by the poles and wires of the company for the pur-

pose of maintaining a public telephone system, was the grant of an easement in the streets, and the conveyance of an estate or property interest, which, being in a large sense the exercise of a proprietary or contractual right rather than a legislative, was irrevocable after acceptance. Citing 64 Fed. 628; 76 Fed. 296; 96 Fed. 113, and 77 Fed. 501.

State vs. Topeka Water Co., 60 Pac. 337, decided by the Supreme Court of Kansas in 1900, holds that a corporation of the State of Kansas as a water company could sell the privileges and rights, conferred by the city, rights obtained not from the State by its charter, but subsidiary in their nature, and by which the corporation obtains privileges of more or less value, to the enjoyment of which corporate existence is not a prerequisite. That these secondary franchises are in nature of property and do not revert to the State on the death of the corporation. Citing U. P. R. R. Co. vs. Lincoln Co., 1 Dill. 325; Federal Cases No. 14, p. 387.

Arthur vs. Commercial Railroad Bank of Vicksburg, 9 Smedes & Mar. 393.

Memphis & L. R. Co. vs. Railroad Coms., 112 U. S. 619. Book 28, Law. Ed. 837.

Treadwell et al. vs. Salsbury Manufacturing Co., 7 Gray 393.

Morgan vs. Louisiana, 93 U. S. 217. Book 27. Law. Ed. 860.

State vs. Western Irrigating Canal Co., 40 Kan. 99; 19 Pac. 349.

Joy vs. Road Co., 11 Mich. 164.

City of Detroit vs. Mutual Gas Co., 43 Mich. 594, 5 N. W. 1039.

Fietram vs. Hay, 122 Ill. 293; 13 N. E. 501.

And, continuing, the Court says: "The ordinances ac-"cepted by the water company were in the nature of con-"tracts, and were property within the meaning of the law. "See Bridge Co. vs. Dix, 6 How. 534, 12 Law. Ed. 535; Long "Island Water Supply Co. vs. City of Brooklyn, 166 U. S. "685, 17 Sup. Court. 718, 41 Law. Ed. 1165; New Orleans "Gaslight Co. vs. La. Light & Heat Producing & Mfg. Co., "115 U. S. 650, 6 Sup. Court 252, 29 Law. Ed. 516; "Thomp. Corp., sec. 6747; Railway Co. vs. Campbell, 59 Pac. "1051, 61 Kan. ——. Under our statute, the words 'per-" 'sonal property' include money, goods, chattels, evidences of "debt, and things in action; and the word 'property' includes "both personal and real property. Section 8, cl. Gen. St. "1897. In the making of said contracts evidenced by ordi-"nances, the city was not exercising legislative or govern-"mental powers, but quasi private power conferred by law, "and in such matters it could exercise its business affairs gov-"erned by the same rules as apply to an individual or a private "corporation. First Dill Mun. Corp., sec. 27, and cases "cited; Illinois Trust & Sav. Bank Co. vs. City of Arkansas "City, 22 C. C. A. 117, 76 Fed. 271, 34 L. R. A. 518."

The nature and source of the waters of plaintiff make them peculiarly of a strictly private nature. They are created or developed by deep wells on lands owned first by the Eastmans and then by their said "successors in interest in their water "works." They are not appropriated waters.

Southern and others vs. San Diego Flume Co., 112 Fed. 228, is a case throwing a strong side light on some phases of the case at bar. The learned Judge in explaining the basis of former decisions, now overruled, in which it had been held that water appropriated under the Constitution and laws of California for sale, rental or distribution is charged with a

public use, and that where a corporation appropriates and furnishes water for such purposes, the rates must be established in pursuance of law, and that they could not be fixed by private contract, and that nothing could be charged to the legal rate, refers to waters *appropriated* under the provisions of the Constitution of California of 1879.

And the Court calls attention to the fact that "defendants "by their answer aver that the rights acquired by the com-"plainant company 'were acquired by it as an appropriation " 'under the Constitution and statutes of the State of Cali-" 'fornia, and of the acts of Congress of the United States, " 'the contract cannot be treated as an ordinary contract be-" 'tween individuals, irrespective of the duties and obliga-" 'tions of the defendant to all of its consumers.' "

And the Court says: "But for adverse rulings, * * * "I should concede the potency * * * of the suggestion "that no 'ordinary' contract nor any other sort of a contract "with private individuals could be made in respect to water "appropriated under the Constitution of California of 1879."

In the case at bar, no such difficulty is presented, as these waters are *unappropriate, private well waters*, concerning which many enactments and rules of law applicable to appropriated waters have no application.

And yet, even in regard to *appropriated* waters under Constitution and laws similar to those of Idaho on same subject, the California Courts hold, and the Federal Courts have followed them, that an appropriator of water for sale, rental of distribution may make valid contracts with customers for furnishing water which are not affected by subsequent action of Boards of Supervisors in fixing rates under statute. How much plainer is it that this may be done when a person owns unappropriated, private waters!

THE NATURE AND SOURCE OF THE WATERS.

The nature and source of the waters of plaintiff make them peculiarly of a strictly private character. They are created or developed by deep wells on lands owned first by the Eastmans and then by their said "successors in interest in their "water works." They are not *appropriated* waters. They are not from waters *subject* to *appropriation* under the Constitution and laws of Idaho. They are as much *private* property as the soil of the land where the wells were made by deep boring.

Cardelli et al. vs. Comstock Tunnel Co., 66 Pac. 950.

Willow Creek Irrigation Co. vs. Michaelson, 60 Pac. 943.

On page 944 the Court says: "The statute, therefore, "cannot be so interpreted as to include a stream flowing from "a bog or marsh like the one in the case at bar, which did "not make its appearance upon the surface until after the land "had been purchased from the Government by a private indi- "vidual. * * * At that time the water, if it existed at "all, was percolating through the soil or flowing in a sub- "terranean stream having no definite or known channels, "courses or banks. Waters so percolating and flowing form "a part of the realty and belong to the owner of the soil. A "conveyance or grant by the United States of any part of the "public domain to a person, natural or artificial, carries with "it the right of filtrating or percolating water, and to streams "flowing through the soil beneath the surface, through any "undefined and unknown channels, just the same as it carries "with it the right to the rocks and minerals in the ground "which have not been reserved in the instrument or convey- "ance or by statute. Water, intermingling with the ground

"or flowing through it by filtration or percolation or by chem-
"ical attraction, is but a part of the earth, and has no charac-
"teristic or ownership distinct from the land itself. In the
"eye of the law, water so commingling, flowing or motion-
"less, underneath the surface, is not subject to ownership
"apart and distinct from the soil. * * *"

Crescent Mining Co. vs. Silver King Mining Co., 54 Pac. 244; the Court decides: "The ordinary rules of law apply-
"ing to the appropriation of surface streams do not apply to
"percolating water and subterranean streams with undefined
"and unknown courses and banks."

Slosser vs. Salt River Valley Canal Co., 65 Pac. 332.

Some States have held that the right to divert water from a public stream depends wholly upon the use which is made of it and is measured by the rights of its users and appropriators. This is the case in Arizona.

On page 336, above case, the Court says: "Water, being
"public property in any running stream, continues to be public
"property even when diverted for beneficial use, and remains
"such until actually applied to such uses. Our statutes do
"not recognize the right of ownership of water, as distinct
"from its use or application. Whenever an appropriator of
"water ceases to use for a beneficial purpose any water which
"has its source in a public stream, his power or authority to
"control the same ceases."

Such principles have been adopted by a few States only, and such language can have no application to waters developed by deep boring of wells upon the lands owned by those making the wells.

Southern Pac. R. Co. vs. Dufour, 19 L. R. A. 92 (95 Cal.).

In speaking of a spring fed by percolating waters and not

by any running stream of water, the Court, on page 93, says: "There was no water on the spot to which plaintiff could "acquire the right of use from the statutory appropriation or "adverse user, and this principle is supported by unquestioned "authority.

"In Delhi vs. Youmans, 50 Barb. 316, the matter is exten-"sively discussed, and Justice Boardman there said: 'The " 'law controlling the rights to subterranean waters is very " 'different from that effecting the rights of surface streams. " 'In the former case the water belongs to the soil, is part of " 'it, is owned and possessed as the earth is, and may be used, " 'removed, and controlled to the same extent by the owner.' "

And the Court, continuing on page 94, says: "It is ap-"parent that title to the land carried title to the water, and "plaintiff's acts of attempted appropriation created no right or "easement; for no water was present which could be the sub-"ject of appropriation."

Hanson vs. McCue, 10 Am. Rep. (42 Cal.) 299; on page 301 the Court says: "It not appearing that the spring here is "supplied by any defined flowing stream, it must be presumed "that it is formed by the ordinary percolating of water in the "soil. * * * Water filtrating or percolating in the soil "belongs to the owner of the freehold, like the rocks and min-"erals found there. It exists there free from the usufructuary "right of others, which is to be respected by the owner of an "estate through which a defined stream of water is found to "flow. The owner may appropriate the percolation and fil-"tration as he may choose and turn them to profit if he can. "To hold otherwise would be to hold that the plaintiff here "could lawfully claim the right to convert the land of McCue "into a mere filterer for his own convenience. 'Such a claim' "(said the Supreme Court of Pennsylvania in 23 Penn. 528) " 'if sustained would amount to a total abrogation of the right " 'of property.' Roath vs. Driscoll, 42 Am. Dec. 352; the "Court decides that 'water standing or percolating in the soil " 'is part of it, constituting one of the natural advantages of " 'the land, which each one is entitled to use as fully and freely " 'as he can by sinking wells.' "

Fort Morgan Land & Canal Co. vs. South Platt Ditch Co.,

36 Am. St. Rep. 259 (a Colorado case). The Court holds in that suit that the water of every natural stream is the property of the public. Private ownership in the water is not recognized, but the right to divert water and apply it to beneficial uses is expressly guaranteed by the Constitution. In notes to this Colorado case, cited on page 263, it is shown that in Wheeler vs. Northern Colo. Irrigation Co., 10 Colo. 582, that "the Colorado Constitution dedicates all unappro-"priated waters in the natural streams of the State to the use "of the people. The use of water in a flowing stream is open "to all."

In Strickler vs. Colorado Springs, 16 Colo. 61, the Court held that "the prior appropriator's right to use the water of "a stream is a property right which he may transfer by sale."

Metcalf vs. Nelson (8 S. D.), 59 Am. State Rep. 746, the Court decides: "Subterraneous waters not flowing in a de-"fined course or channel, but percolating and seeping through "the surface, is a part of the realty. It belongs to the owner "of the land as much as the rocks and stones in it. * * * "It will be presumed, in the absence of evidence, that a spring "is formd and fed by percolating waters rather than by the 'outbreak upon the surface of the earth of a subterranean "stream. The owner of land upon which a percolating stream "appears is entitled to the waters thereof, and may recover "damages from a person seeking to carry them away."

In a note to this case, found on page 750, the editor says: "The principles of law which govern the right to waters flow-"ing upon the surface of the earth are *unapplicable* to *waters* "*which are beneath its surface and percolate through the soil*, "and the water which is held by the soil, whether sand or sand-"stone, in a state of percolation, is a portion of the soil itself "and belongs absolutely to the owner of the land. He may "appropriate and divert such water at his pleasure." Gould vs. Eaton, 111 Cal. 659.

Tampa Water Works vs. Cline, 37 Florida 586.

Wheelock vs. Jacobs, 67 Am. St. Rep. 659. (This case is found in the 70 Vermont, 162.) The Court decides: "Per-"colating waters are parts of the earth itself, as much as the "soil and the stones, with the same absolute right of use and "appropriation by the owner of the land."

Crescent Mining Co. vs. Silver King Min. Co., 70 Am. St. Rep. 810 (a Utah case). This case holds: "That the ordi-"nary rules of law applying to the appropriation of surface "streams do not apply to percolating waters and the subter-"ranean streams with undefined and unknown courses and "banks."

On page 814, the Court says: "Under such a state of "facts, the law seems to be well settled that water percolating "from the soil is not, and cannot be, distinguished from the "soil itself. The owner of the soil is entitled to the waters "percolating from it, and such water is not subject to appro-"priation. The ordinary rules of law applying to the appro-"priation of surface streams do not apply to percolating water "and subterranean streams, with undefined and unknown "courses and banks. When water percolates through and un-"der the surface of the earth, upon land belonging to one person "and comes to the surface just before it empties itself upon the "land of another, the owner of such land has no right to de-"mand that such percolation shall continue. It is held that "a person may lawfully dig a well on his own land. * * *"

On page 818 the Court says: "We conclude that section "2780 of the compiled laws of Utah of 1888 was intended to "apply to natural water courses having a natural source of "supply, and that it does not apply to percolating waters "arising in the land of the owner and carried through arti-"ficial drains constructed by the owner for the purpose of im-"proving the property and for the convenience of the owner."

Tampa Water Works Co. vs. Cline, 53 Am. St. Rep. p. 262.

Section 1 of Art. XV of Idaho Constitution limits the

kinds of waters whose sale, rental or distribution is therein declared to be a public use, and subject to control and regulation by the State to *appropriated* waters.

Section 2711 of the Revised Statutes, which the defendant claims obliges the plaintiff to furnish water for street sprinkling purposes free of charge, describes the nature of the persons to whom it applies as *corporations*, while sections 2710 and 2712, which are to be considered along with section 2711, show how such corporate persons may obtain use of streets and franchise to supply inhabitants and fix rates. We have already attempted to show that section 2711 did not apply to the plaintiff, or to any of its predecessors, for the reason that the grant, easement and franchise under which the water works were operated was obtained not by any corporation from the State or city, but by individuals, and was property appertaining to and commingled with the water works property and that it had the same nature in the hands of their successors that it had in the hands of the Eastmans, where it first became property or a property right.

We now insist that under the Constitution of Idaho, this well water is not under State control or regulation as to sale, rental or distribution by its very nature. It is simply private property. The Legislature had in mind, in enacting section 2711, common waters, surface waters, waters that had been or might be appropriated, waters of a public nature, and waters supplied by and from natural and usual sources. It was not within the legislative intent that private artesian wells obtained and developed by deep boring into the rocks, on an average of 400 feet, were to be included in the words of the section, "so long as the supply permits." The waters in the minds of the Legislature were the waters where there *was a*

supply from some natural sources. In the sense meant by the Legislature, there was, for these water works, no supply of water. But it was created and developed at great expense because there was no supply. Suppose the section, instead of being limited to corporations, should have declared that individuals who became members of a firm, "formed to supply "water to cities and towns must furnish pure, fresh water to "the inhabitants thereof for family uses, so long as the sup- "ply permits, at reasonable rates and without distinction of "person, upon proper demand therefor; and must furnish "water to the extent of their means in case of fire or other "great necessity, free of charge," would it then be contended that the legislative intent included waters obtained from no natural source of supply, but obtained by boring twenty-nine wells to the depth of 400 feet? Then, if by such deep borng pure artesian cold water was found in twenty-six wells and artesion hot water in three wells, would it be said that these artesian hot and cold waters were what were in the contemplation of the Legislature when it used the words "so long "as the supply permits"? We think not.

Again, the obligation of furnishing free water "in case of fire and other great necessities" is limited to "within the extent of their means." What means? Does it mean that if the owners of the water works are rich enough to get the water by some extraordinary and expensive methods, such as shipping it in by railways (which they might do in case of necessity for family use), that then it was "within the extent of their means" to also ship in water for sprinkling o fthe streets? We think "within "the extent of their means" should be interpreted to mean and to include such waters as they had on hand after domes- uses were supplied, and not to mean that the owners must go

into their pockets for the special purpose of obtaining water for the sprinkling of streets by the running of steam engines and of pumps. We think the owners were not to be obliged to hire men, buy engines, burn coal worth $8 per ton, to run pumps, to furnish water free for street sprinkling purposes.

The testimony shows that every gallon of cold water used for street sprinkling had to be thus put into the water works pipes by such pumping. Nor do we think the section ever contemplated any use of hot artesian water. It is shown that the waters of the company are expensive waters, are pure waters, and that the demand for them is greater than the supply, except by means of extraordinary labor and great expense. It is shown that the city of Boise is abundantly supplied with river, ditch and well waters suitable for street sprinkling, not fit for drinking or for domestic use and of no value except the cost of taking up into sprinkling wagons. That it has an abundance of cheap water. This is not denied. But defendant says (page 65K) in effect that the taking of the waters for street sprinkling was a great necessity because the city is in a dry and arid region, and "that the said water "of plaintiff was, under the law, of no value to plaintiff or "to the Idaho company." "That, by reason of such neces- "sity, the Artesian Hot & Cold Water Company, as such cor- "poration, organized, formed and authorized as aforesaid, "was at all times, and is, charged with the duty and obliga- "tion of furnishing this defendant water for fire and other "great necessities, free of charge, and that without regard to "the other possible means of securing water for such pur- "poses." We quote this from defendant's answer, not because it is a denial, nor as evidence, but to show its position and argument as to its "great necessity." Plaintiff contends and its predecessor contended that there was no such "great "necessity" on the city for water for street sprinkling as is

contemplated by this provision of the statute. The mere fact that the streets need sprinkling does not make it necessary for the city to take our very expensive waters when it has an abundant supply of cheap water—water costing nothing but the trouble of taking it. The word "necessity," we say, as here used, included both the necessity to have the streets sprinkled and the necessity to take plaintiff's waters, instead of the public waters in, under and about the city, and that there was no necessity to take what cost very much when the city was supplied with what cost nothing.

Defendant takes the further position that the plaintiff should charge rates high enough for water for domestic use so that it can afford to furnish the waters used on such streets as are sprinkled free of charge. That, in effect, all the customers of plaintiff are to be charged to pay for sprinkling the portion of streets sprinkled, although a large portion of such streets are in parts of the city where pliantiff does not nor did its predecessor furnish any water to the inhabitants, but where the water is furnished to the inhabitants by its competitor in business, said Sonna.

This takes us to another ground of our objection to furnishing free water for the sprinkling of streets. It is that the law and public policy of Idaho make the sprinkling of streets a local benefit to be paid for by the owners of lots abutting on portions of streets sprinkled. Up to 1897, what water was used for street sprinkling was paid for or furnished by such abutting owners. Up to that time, the city had never had anything to do regarding waters for such purpose. In

1897 the Legislature amended the charter of the city and provided that "the Mayor and Common Council shall have "full power and authority to provide for the sprinkling, "cleaning and repairing of the streets at cost of owners of "abutting property." After the passage of this act, and for the years 1897, 1898 and 1899, the city did so provide, and what waters were taken for street sprinkling from said water works were taken under contract between the city and the owners of the water works by which the city was to and did pay for the same. And the city assessed the cost of the same for each of these years to the owners of such abutting property and collected the same both by legal proceedings in the Courts and otherwise.

We claim that if section 2711 ever implied (and it does not so state) that water for street sprinkling was to be furnished free to the city, while in fact it was, as defendant says, to be paid for by all the inhabitants who were customers of water company, such implication no longer exists, but was repealed by such charter amendment of 1897. It is unjust that customers who reside on streets not sprinkled have to pay for sprinkling those streets which are remote from them, and that this is not the present policy of the law, and if it ever was, by implication that such amendment now makes it a local benefit to be paid for by those benefited. The position of defendant in this regard as shown on page 64 of record, is not in harmony with the charter, since the amendment of 1897. We may presume that in legislating for the city, the Legislature took into consideration the fact that the sprinkling of streets in the city had theretofore been done and the water furnished therefor by the owners of abutting property, and therefore, in placing the control, designation and regula-

tion of the same in the city government, it left the cost and expense of the same where usage and custom had placed it, with the owners of abutting property .

FOREIGN CORPORATIONS IN IDAHO—RIGHT TO DO BUSINESS—STATE COMITY.

It is of the public policy of the State of Idaho to extend the right, privilege and power to do business therein to foreign corporations, and to give them these benefits to the same extent enjoyed by domestic corporations.

Section 10 of Article XI of the Constitution of Idaho recognizes this in requiring foreign corporations to have known places of business, and an authorized agent or agents, upon whom process may be served, and providing that they shall enjoy or exercise no greater rights within the State than could be enjoyed by similar corporations created under the laws of Idaho.

Rev. Statutes of Idaho, 1887, section 2653, provides that foreign corporations doing business in Idaho must designate some person residing in the county in which the principal place of business of the corporation is conducted, upon whom process may be served, and must file in the office of Secretary of State and with the Clerk of the county a copy of such designation, and then reads: "That such foreign corpora-
"tions complying with the provisions of this section shall
"have all the rights and privileges of like domestic corpora-
"tions, including the right to exercise the right of eminent
"domain, and shall be subject to the laws of this territory
"applicable to like domestic corporations."

On page 88 of the transcript it reads: "It is here admitted "by the defendant that the plaintiff incorporation has filed "with the Secretary of State, and with the Clerk and Recorder "of Ada County, a paper designating its principal office and "place of business in Idaho as Boise City, Ada County, and "appointing and designating B. S. Howe its agent, upon "whom service of process can be made in compliance with the "laws and Constitution."

Demarest vs. Grant, 13 L. R. A. 854. This is a new York case decided in 1891. It concerns a West Virginia corporation, incorporated by persons residing in the State of New York. On page 855 the Court says: "Counsel for plaintiff "upon this evidence moves to strike out the certificate of in-"corporation, and of the testimony relating thereto, on the "ground that 'the directors of the concern were residents of " 'New York, and that under the statute of West Virginia " 'it was necessary, in order that the corporation be duly in-" 'porated, that the directors of the concern should be resi-" 'dents of West Virginia unless a special resolution were " 'passed by the corporation permitting persons of any State " 'to be such directors.' The motion was denied; and there-"upon, on motion of counsel for defendants, the complaint "was dismissed because no cause of action was proved against "the defendants personally. There was sufficient evidence of "user to make it clear that the company had accepted its char-"ter, with all its privileges and liabilities, whatever they "might be. * * * As to the other points which have been "actually raised by the motion to strike out the certificate (of "incorporation), we think a proper disposition was made of "them by the Court below.

"By the statute of West Virginia, the incorporation pre-"cedes the election of directors. After the incorporation, and "subsequent to the issuing of the certificate thereof by the "Secretary of State, the corporators named therein, or a "majority of them, are directed by statute to appoint a time "and place for holding a general meeting of the stockholders, "to elect directors, make by-laws, and transact other busi-"ness. * * * The counsel for plaintiff was therefore in "error in his statement as to the law of West Virginia.

"We come, then, to the question whether, upon the facts "already set out, this corporation was so far valid as to be "entitled to recognition as such in the Courts of our State. "The plaintiff says it clearly appears that the corporators "thereof were citizens of New York, and the corporation was "formed by them in the State of West Virginia for the sole "purpose of doing business out of that State and in the State "of New York, in which latter State its principal office was "also to be located.

"These facts, he says, conclusively prove the invalidity of "the West Virginia corporation, so far, at least, as this State "and its citizens are concerned. If mistaken in that view, he "still urges that such facts render it a question for the deter- "mination of the jury whether the corporation was attempted "to be made in good faith or as a mere evasion and in fraud "of the laws of West Virginia or New York. He claims, "if the jury should find the purpose was one of evasion, that "in such case the corporation would furnish no defense, and "the defendants would be liable as individuals. We are quite "clear that the case should not be submitted to a jury to pass "upon the question of evasion as a matter of fact. If it were, "we find different juries coming to different conclusions upon "the same facts, and we should have a corporation or no "corporation according to the view of the jury may take of "such facts. * * * It must be a corporation as to all "persons with whom it has business dealings or as to none. "In other words, it must be a question of law instead of fact. "The Courts of any country recognize foreign corporations "through what is termed 'National or State comity'; but "whether such recognition shall be given must be decided by "the Courts of the country where the corporation seeks to do "business. In our State, as in others, it is a question of "domestic policy, and what that policy is must be deter- "mined by an examination of our legislation. If we find any "direct enactment on the subject it is our duty to obey it "and in its absence we must determine the question with "reference to our general legislation, and to the circumstances "which surround us as a great and growing commercial com- "munity, having need of and employing large amounts of "combined capital and for whose prosperity and growth it is "of the utmost importance that such capital should have the

"greatest facilities extended it for useful employment, with "reasonable and proper personal exemptions from liability. "We can find no reason for a domestic policy that should exclude from recognition by our Courts, foreign corporations "generally. It may be safely said there can be no such domestic policy at the present day in a civilized State. The "question then arises, Shall we go behind the certificate of "incorporation or charter of a foreign corporation for the "purpose of inquiring under what circumstances, and for "what purpose outside the charter, it was incorporated? "This can only be claimed on the ground that the charter "was obtained in fraud or evasion of the laws of the State "which granted it, or for the purpose of evading the provisions of our own laws. It is plain there was in regard to "the procurement of this charter no fraud upon or evasion "of the laws of West Virginia, even if we should admit that "such fact would constitute good ground for our refusal "to recognize such corporation, although no proceedings have "been taken to annul its charter in the State which granted it. "This point is by no means clear. However that may be, "it is impossible not to see that the State of West Vriginia "has adopted a policy which favors the formation of corporations within her borders, and pursuant to her laws, while "the members and officers may be non-residents, and where "the principal business of the corporation is to be performed "outside of the confines of the State.

"The agreement which was signed by the corporators in "this case, and duly acknowledged and presented to the Secretary of State of West Virginia, clearly showed that the "corporators were residents of New York, and that the principal office of the corporation was to be in New York; and "the inference was a fair one that the principal business of the "corporation was also to be conducted in New York. The "Secretary of State to whom the papers for the organization "of the corporation were presented, was compelled to pass "upon and decide the question whether they conformed to "the laws of West Virginia, before he received or filed them, "or gave the certificate of incorporation. He did not pass "upon the question and did thereupon issue the certificate "of incorporation under the great seal of the State and at- "tested by his official signature. So far as the laws of West

"Virginia are concerned, it is plain that the corporators "thereupon became a corporation, and in that State the cer- "tificate was, by the laws thereof, evidence of the existence "of such corporation. There was no fraud or evasion of the "law of West Virginia in thus becoming incorporated. The "reference to her laws above made shows conclusively that

"the formation of corporations thus composed, and for the "purpose of doing their principal business outside the limits "of that State, was contemplated in those laws. This cor- "poration was beyond all question legally incorporated, and "entitled to recognition, in the State of West Virginia. Un- "less, therefore, it can be said that the acts of our citizens "in procuring an incorporation under the laws of West Vir- "ginia for the purpose of doing business here were, as a "matter of law, a fraud and an evasion of our own laws, and "hence in conflict or inconsistent with our domestic policy, "such foreign corporation is entitled to recognition and pro- "tection in our own tribunals. Merrick vs. Van Cantwoord, "supra.

"It is urged that such acts are thus inconsistent and in "conflict with our policy, because citizens of our own State "are in that way enabled to evade our own laws relative to "home corporations, and to avoid personal liability by incor- "porating under the laws of foreign States, which may be "more favorable to members than are our own laws. I "think when this claim is examined in the light of our own "legislation, it will be seen that there is no substantial basis "for it to rest upon. An examination of our laws shows that "it is, and for many years has been, the policy of this State "to enlarge the facilities for the formation of corporations. "General laws are on our statute book for the formation of "corporations of almost every conceivable kind, and under "some of them a corporation of the kind mentioned in this "case could readily be formed. The freedom from personal "liability would be as great, and could be as easily attained, "under our own as under the laws of West Virginia. The "security of the creditor would not be substantially greater "in the case of the domestic than in that of the foreign cor- "poration. In the latter the creditor has the remedy by "attachment, and he can obtain about as easy access to its "property as if it were domestic instead of foreign. There

"is really nothing to evade by incorporating under a foreign "law. No harmful results flow to a creditor or to the community here by such incorporation. Where the corporation "formed under another jurisdiction comes here to do business of a kind which we permit to be done by corporations, "and where our laws provide for incorporating individuals "for the purpose of doing that business, it is difficult to see "how the terms 'evasion' and 'fraud' can be properly applied "to acts of our citizens whereby they obtain incorporation in "another State. When they come into our State to do business, they must conform to our law's relating to foreign "corporations, and comply with the terms laid down by us "as conditions of allowing them to transact business here. "In the case of many kinds of corporations, such conditions "have already been imposed by our laws; and if there be any "kind where none is imposed, it is conclusive evidence that "up to this time the Legislature has not thought it conducive "to the true interests of the State and its citizens to impose "them. I do not intimate that it is necessary for a State "to expressly, by statute, exclude foreign corporations from "acting within its jurisdiction. The policy of the State may "exclude them, and that policy may be clearly established by "reference to the general legislation of a State. I find none "such in the laws of this State.

"It has been urged that the easy way which our laws provide for forming corporations is itself a reason why we "should not recognize as a corporation those of our own citizens who have gone to another State for the purpose of "incorporating themselves under the laws thereof, to do business in our own State as such corporation. We think there "is very little force in the argument. The public policy which "we see in our State, as evidenced by her law supon the subject of the formation of corporations, is one which looks "to their ready and easy formation as a means of transacting "business with an accumulation of capital, and an exemption "from personal liability to the largest extent consistent with "reasonable supervision by the State. The facilities for incorporation offered by this State are not the result of any "desire to promote the formation of corporations here as "against their formation in other States. They are offered "because of a policy on our part which urges upon the State "the propriety of furnishing them as one means of control-

"ling the business done by them, and keeping it within our "borders. If in any particular case it is thought by those "interested in the matter that the business can be done in our "own State and by our own citizens with greater facility "under the form of a foreign corporation than under that of "a domestic one, there is no public policy which forbids its "transaction under such form. The supervision of a foreign "corporation by this State may easily be exercised by impos- "ing terms as a condition of permitting it to do business here. "The absence of any such terms in our legislation forms no "reason for refusing to recognize the corporation. The power "rests with the Legislature to say whether any, and, if so, "what, terms shall be imposed upon such corporations as a "condition of granting them permission to do business here. "Those terms can only be imposed by the Legislature; and in "their absence our Courts ought not merely on that account "to refuse to recognize a foreign corporation. In the absence "of legislation, our Courts must either refuse absolutely, or "else they must recognize the right of such corporations to "come to this State and do business here. The Courts can- "not themselves impose terms or conditions."

Oakdale Mfg. Co. vs. Garst, 49 Am. St. Rep. 184 (18 Rhode Island).

This case decides: "That it is not a violation of the laws "or policy of the State of Rhode Island for citizens thereof "to procure an act of incorporation in another State for the "purpose of carrying on business as a corporation in Rhode "island."

The third point made by the defendant was, "that one pur- "pose of the contract was to form a corporation in violation "of the laws of this State."

On page 787 the Court says: "With reference to the "third ground of defense, it does not appear that the agree- "ment in any way violates the laws or policy of this State, "and if it did, the defendant, being a party to it, could not "set it up: Chafee vs. Sprague Mfg. Co., 14 R. I. 168. The "mere fact that the complainant corporation is created under "the laws of the State of Kentucky is not sufficient to war- "rant a dismissal of its case, for foreign corporations have "frequently been recognized as suitors in this Court: Wind- "ham County Bank vs. Kendall, 7 R. I. 77; Howe Machine

"Co. vs. York, 11 R. I. 388; Boston, etc., Smelting Co. vs. "Smith, 13 R. I. 27, 43 Am. Rep. 3; Singer Mfg. Co. vs. "King, 14 R. I. 511. They are also recognized as doing "business here by comity. Pierce vs. Compton, 13 R. I. 312. "While the fact that citizens of Rhode Island go to Kentucky "for an act of incorporation, is one that naturally excites "curiosity, if not suspicion, as to the motives and good faith of "the concern, yet, so long as it pursues a lawful business and "violates no law of this State, we do not see how we can "refuse to recognize it. True, the advantage of yearly state-"ments and liability of stockholders given to creditors under "our statutes are wanting; but that is a matter for those who "deal with the corporation to consider. We can hardly deny "the right of a foreign corporation to do business in this "State, upon considerations of public policy, when our own "statutes (Pub. Laws, c. 1200) expressly provide for cor-"porations formed in this State for carrying on business out "of the State.

Lancaster vs. Amsterdam Improvement Co., 24 L. R. A. 322. (This case is found in 140 N. Y.) The case decides: "The right of a defacto corporation to transact business under "a franchise which another State has attempted to confer, "cannot be questioned by individuals. A foreign corporation "incorporated for the purpose of dealing in the purchase and "sale of real property, is not prevented by the statutes or "public policy of the State of New York from transacting "such business in that State. A foreign corporation can "transact any lawful business in New York State which a "non-resident natural person can do."

People. State of Illinois, *ex rel* Stephens vs. Fidelity & Casualty Co., 26 L. R. A. 295.

On page 298 the Court says: "It is admitted that our "statutes do not in express terms prohibit a company from "doing more than one kind of insurance. The rule is that, "where there is no positive, prohibitive statute, the presump-"tion under the law of comity prevails, that between the States "of the Union, is that the State promises a corporation organ-"ized under a sister State to do any act authorized by its

"charter, or the law under which it is created, except when "it is manifest that such act is obnoxious to the policy of the "law of this State. In Stevens vs. Pratt, 101 Ill. 206, it was "held by this Court that mere absence of legislation authoriz- "ing the formation of a particular class or kind of corpora- "tions does not show that it is against the public policy to "create such corporations, but that such public policy must "be expressed in some affirmative way."

"In Cowell vs. Colorado Springs Co., 100 U. S. 55, 25 L. "Ed. 547, the Supreme Court of the United States said: " 'That the policy of the State or Territory does not permit " 'the business of the foreign corporation in its limits or allow "'the corporation to acquire or hold real property must " 'be expressed in some affirmative way; it cannot be inferred " 'from the fact that its Legislature had made no provision " 'for the form of similar corporations or allows corporations " 'to be formed only by general laws. Telephone companies " 'did business in several States before their Legislatures had " 'created or authorized the creation of similar corporations; " 'and numerous corporations existing by special charter in " 'one State are now engaged, without question, in business in " 'States where the creation of corporations by special charter " 'is forbidden.' "

Lake View Land Company vs. San Antonio Traction Co., 16 Am. and Eng. Corp. Cases, 1. (Decided by the Supreme Court of Texas in 1902. Reported 66 S. W. Rep. 766.)

This case holds that a foreign corporation having power under its charter to acquire and hold real and personal property may acquire title to such property in the State of Texas. It also holds that a contract with a street railway company is assignable. The question stated on page three: "When ap- "pellant bought the land and appurtenances and above con- "tract and other privileges belonging to the New England "company, did it obtain thereby the right to maintain a suit "for damages for any breach of the contract that would have "been held by this vendor of the New England company?

" * * * Did the purchase of the contract by a foreign "corporation, before it procured a permit to do business in "Texas, confer upon the purchaser the right to sue for dam-"ages arising out of the breach of the contract? Is the con-"tract such as by law may be assigned so as to give the "assignee the right of action for its property? There is no "law in Texas which prohibits corporations created in other "States to purchase and hold land and personal property in "this State, not authorized by their charters or the laws under "which they were created. * * * The purchase of the "contract, together with the lands invested the appellant with "all the rights which the original obligee would have had "under the same circumstances."

Revised Statutes of Idaho, 1887, section 2827, reads: "Any "person, whether citizen or alien, may take, hold and dispose "of property, real or personal."

EVIDENCE OFFERED AND REJECTED.

On the trial, plaintiff, after having proved that all the water used for street sprinkling had to be pumped at extra expense, and that the city had notice of this, asked the witness (page 92) "if the cold water system was paying dividends or mak-"ing profit?" This was asked on the theory that if it was not being operated at a profit, and if the city knew this and the water taken for street sprinkling required extra work and expense, that then it was not, and the city knew it was not, "within the extent of the means" of the company to furnish the water, and so the taking was wrongful even if the section, 2711, was in force against the company.

The defendant objected to the question on the ground that it was irrelevant and immaterial, for the reason that it was merely a question of fixing rates. The objection was sustained, to which plaintiff excepted.

EVIDENCE OF TITLE.

Miners Ditch Co. vs. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

On page 323 the Court says: The deed was admissibly in "evidence, and, being in, was prima facie of the regular and "due execution of the deed. This point is settled by the de-"cisions. Angell and Ames state the rule deduced from the "authorities thus: 'Where the common seal of a corporation " 'appears to be affixed to an instrument and the signatures " 'of the proper officers are approved, Courts are to presume " 'that the officers did not exceed their authority and the seal " 'itself is prima facie evidence that it was affixed by the " 'proper authority.' "

Leggett et al. vs. N. J. M. & B. Co., 23 Am. Dec. 728.

The case decides that "the appearance of a corporate seal "to a writing is evidence that it was affixed by the proper "authority." On page 740, note to the above case, the editor says: "Ownership of property, whether real or personal, "carries with it the same general power of disposition in cor-"porations as in individuals, except where the powers are re-"strained by statute or by considerations of public policy.

"Angell & Ames on Corporations, sec. 187.

"Says Campbell J. in delivering the opinion of the Court, "in White Water Valley Canal Co. vs. Vallette, 21 How. U. "S. 424: 'It is well settled that a corporation, without special " 'authority, may dispose of lands, goods and chattels, or of " 'any interest in the same, as it deems expedient and in the " 'course of its legitimate business may make a bond, mort-" 'gage, note or draft. * * * These cases establish be-" 'yond question the proposition that *jus disponendi* is as nec-" 'essary an incident of ownership in corporations as in indi-" 'viduals. Hence, if a corporation possesses only such pow-" 'ers as are expressly granted, or as are necessary to carry " 'out those so granted, it has, nevertheless, the power of " 'buying and selling, without express grant, unless restrained " 'by its charter or otherwise, because that power is incident

" 'to its express powers. It might, therefore, in the absence " 'of any such restraint, sell whatever it has the right to own. " 'It may sell all its corporate properties for a corporate or " 'lawful purpose.'

"Sargent vs. Webster, 13 Metz. 498.

"Treadwell vs. Salisbury Mfg. Co., 7 Gray 393.

"Hodges vs. New England Screw Co., 1 R. I. 347.

On page 745 it is said: " 'It is a well settled rule that " 'where the corporate seal appears affixed to a conveyance or " 'mortgage, particularly by the officer who is the legal custo- " 'dian of it, and the signatures of the proper officers approved, " 'the presumption is that such instrument was executed pur- "suant to regular and lawful authority from the corporation " 'and the burden of proving is on those who dispute the " 'existence of such authority to show the contrary. * * * " 'And it was held in Union Stock Mining Co. vs. Bank, 2 " 'Colorado, 226, that the presumption in favor of the valid- " 'ity of a deed in the name of a corporation with the corporate " 'seal and president's name signed thereto, would not be " 'overcome by showing that there was no vote of the direct- " 'ors to authorize it, on the ground that there might have " 'been given, without such vote, large powers being within " 'the exercise of the officers of the corporation by the tacit " 'assent of the board in whom the corporate authority is " 'vested.' "

EVIDENCE OF THE EXISTENCE OF PLAINTIFF CORPORATION.

People vs. Formosa, 131 N. Y. 478; 27 Am. St. Rep. 612.

The case decides that: "The existence of the corporation is "established prima facie,—all evidence tending to show that "it transacted business as such, and by the fact that all the "witnesses spoke of it as a corporation."

Certificate of incorporation. Plaintiff's Exhibit "A," page 93.

Proof of acting as such, testimony of B. S. Howe, page 88.

Admission by defendant on page 88 in these words: "It "is here admitted by the defendant that the plaintiff incor- "poration has filed with the Secretary of State," etc.

EASTMAN GRANT FOR PUBLIC PURPOSE.

The grant made to the Eastmans was for a public purpose, of supplying the inhabitants and the city with water, and could not have been made for a private use, as the Common Council had no such power or authority.

Sherlock vs. Kansas City Belt R. Co., 142 Mo. 172;

64 Am. St. Rep. 551.

On page 557, the Court says: "The franchise must be "granted for public, and not for private purposes." And on page 558 the Court says: "The Municipal Council of Kan- "sas City has large powers over the streets, alleys and public "highways of said city; still, it must exercise that power in "conformity to the Constitution of the State. By the dedi- "cation of streets and alleys to public use, a trust is confided "to the city to preserve and utilize them for that purpose "only."

POLICE POWER—GOVERNMENTAL CONTROL OF PROPERTY, OF BUSINESS—WHEN PERMISSIBLE.

State vs. Associated Press, 81 Am. St. Rep. 368.

The case decided that: "It is only on the basis of the exer- "cise of the police power, and that exercise based on certain "exceptional conditions, that a person who has dedicated his

"property to a public use, or who is engaged in some *quasi* "public business, and in which some privilege or immunity "is incident to such business, can be brought under govern-"ment control in relation to such property or business and "its regulation."

After interpreting and reviewing the case of Munn vs. Ill., 94 U. S. 113, which had been relied upon, and many other cases, the Court says, on page 376, quoting from Lord Ellenborough: "There is no doubt that the general principle "is favored, both in law and in justice, that every man fix "what price he pleases upon his own property, or the use of "it; but if, for any particular purpose, the public have a right "to resort to his premises and make use of them and he have "a monopoly, he must, as an equivalent, perform the duty "attached to it, on reasonable terms. In short, it is the privi-"lege conferred, either directly or indirectly, or the dedica-"tion to the public use, which give origin to the duty toward "the public to demand only reasonable compensation for ser-"vices rendered."

On page 378, continuing, the Court says: "In this coun-"try, mills being at an early day operated by water, they "became affected by a public use, by reason of the fact that "in order to establish them, it became necessary to exercise "the power of eminent domain in flooding the lands of others, "and thus the owner of the mill, having accepted govern-"mental aid in establishing his mill, had to submit to govern-"mental control as to his charges for grinding. And when "steam mills came into use it was an easy transition for the "Legislature to regulate their tolls without inquiring the rea-"son or making any distinction between mills of the latter "and of the former kind. The same view holds as to the "right to fix the fees of hackmen, exercising, as they do, "a public employment in the public streets and engaged in an "occupation affording special opportunities for impositions "and frauds, and therefore requiring close supervision; they "are granted privileges of occupying certain public stands "denied to others, and their charges to the public are regu-"lated, which is only a condition imposed in return for privi-"leges granted,—privileges otherwise liable to abuse.

"A like rule holds as to common carrier, one who holds "himself out to the public as ready and willing to carry, for "hire, certain classes of goods. Doing this, he thereby exer- "cises, so it is said, a kind of public office, and grants the "public such an interest in his business as authorizes each "individual to demand the carriage of his goods upon tender "of a reasonable, or legally regulated compensation."

On page 380, the Court quotes from Cooley on Torts, as follows: "It is a part of every man's civil rights that he be "at liberty to refuse business relations with any person whom- "soever, whether the refusal rests upon reason or is the result "of whim, caprice, prejudice or malice."

And, continuing, the Court says: "Commenting on the "same topic, it is said by another author: 'Business rela- " 'tions must be voluntary in order to be consistent with civil " 'liberty. An attempt of the State to compel one man to " 'enter into business relations with another can only be justi- " 'fied by some public reason or necessity. In an ordinary " 'private business relation, the State cannot constitutionally " 'interfere, whatever reason may be assigned for one's re- " 'fusal to have dealings with another. It is no concern of " 'the State or of the individual what those reasons are. " ' * * * So that it is only on the basis of the exercise " 'of the police power, and that exercise based on certain " 'exceptional conditions, that a person engaged in some *quasi* " 'public business and enjoying some privilege or immunity " 'incident to such business, or where he has dedicated his " 'property to a public use, that he can be brought under gov- " 'ernmental control in relation to such property or business " 'and its regulation.' "

And on page 391 reads: "Depriving an owner of property "of one of its essential attributes is depriving him of his "property, within the constitutional provision, as the right to "use of property is all that makes it valuable. * * " "Both in the State Supreme Court, and in that of the Nation "it was ruled that the fixing of a reasonable compensation of "the use of property was wholly a legislatve and not a judicial "question—that is, a maximum in rates beyond which the "owner could not go."

And quoting from Judge Field, page 393, the Court says: "I believe the time is not distant when the evils resulting from "this assumption of a power on the part of the government "to determine the compensation a man may receive for the "use of his property or the performance of his personal ser- "vices, will become so apparent that the Courts will hasten "to declare that government can prescribe compensation "*only when it grants a special privilege,* as in the creation of "a corporation, or when the service which is rendered is a "public service, and the property is, in fact, devoted to a "public use."

JURISDICTION WHEN CLAIM IS AN ASSIGNED ONE.

This action, sounding in tort, this Court has jurisdiction of the assigned claim—the first cause of action.

Ambler vs. Eppinger, 137 U. S. 480, 481; L. Ed. Book 34, 765.

Deshler vs. Dodge, 57 U. S. (16 How.) 622.

Bushnell vs. Kennedy, 76 U. S. (9 Wall.) 387.

In the case last cited the Court says: "It has recently been "very strongly argued that the restriction only applies to con- "tracts 'which may be properly said to have contents,' not "mere naked rights of action founded on some wrongful act, "some neglect of duty to which the law attaches damages, "on rights of action founded on contracts which contain "within themselves some promise or duty to be performed."

Com. et al. vs. Chicago B. & C. R. Co., 48 Fed. 177.

Bertha Zinc & Mineral Co. vs. Vaughn, 88 Fed. 566.

JURISDICTION—CITIZENSHIP.

"A corporation is conclusively presumed to be composed of "citizens of the State or Nation which chartered it, or from "which it derives its powers."

1st Fos. Fed. Prac. 3d Ed., p. 67.

Muller vs. Dows, 94 U. S. 444.

Law Ed. Book 24, p. 207.

WATER PRIVATE PROPERTY — MUST BE PAID FOR.

We have already seen that section 1 of article XV, Constitution of Idaho, makes the use of "*appropriated* waters," alone a "public use" and "subject to the regulation and control of "the State in the manner prescribed by law." The use of well water, developed on one's own land, even for sale, or rental, or distribution, is not made a public use by our Constitution, and not by the Constitution made subject to regulation and control by the State.

By sec. 2 of art. XV, the right to collect rates for the use of water supplied to a city, or town, is made a franchise, and must be exercised in the manner prescribed by law, and section 6 of said art. XV provides that the Legislature shall provide the manner in which reasonable maximum rates may be established, for the use of water. While these waters of plaintiff are strictly private, and the use of them, whether they are to be sold or to be rented or distributed, or not used at all, is not subject to control by the State, yet the collection of rates for the water supplied to the city is a franchise and

must be exercised by authority of law. And we admit the *rates* may be regulated by the State.

The Eastmans, and their successors in interest, by necessary implication, received from the city this franchise of the right to collect reasonable rates, or compensation, for waters supplied to the inhabitants of the city, and that was the object in view, and for which the privilege of the use of the streets in the laying of their pipes was granted, as declared by the ordinance itself, which says, "for the purpose of furnishing "the inhabitants of the city with mountain water." The Legislature of Idaho has never, since the adoption of the Constitution, enacted any law providing the manner in which reasonable maximum rates may be established to be charged for the use of water sold to cities or towns, nor was there any statute in the Territory of Idaho making any such provision, except where the city was dealing with a corporation, in which case it was provided that the rate should be established by a commission appointed, two by the water corporation and two by the city; so that, when the waters were furnished by a corporation, even then the rates were to be fixed by a mutual arrangement; but there was no statute regarding how rates should be fixed for the use of water furnished by a natural person .

As we have before attempted to show, so we now repeat, that, by neecssary implication, the acceptance of the grant, and ordinance, made to the Eastmans was on conditon, agreed to by them, that they should furnish water without distinction of person, at reasonable rates, to all who demanded it, to the extent of their means. Even if section 1 of article XV did apply to these waters, if they were appropriated waters, still the *use* only would be public, and subject to regulation.

but the *waters* would not be, nor could they be taken for public use, without compensation.

Sec. 14 of Art. I, Constitution of Idaho, provides: "Private property may be taken for public use, but not until a "just compensation, to be ascertained in a manner prescribed "by law, shall be paid therefor."

The case of People vs. Elk River M. & L. Co., 107 Cal. 221, 48 Am. St. Rep. 125, is a case where the waters were appropriated waters of a river. On page 128, the Court says: "It is contended that the law of the case is changed "by article I, section 14 of the State Constitution, which "makes the use of water for sale, rental or distribution a "public use. Certainly it was not intended by that provision "to appropriate such water for the use of the public without "compensation. The section recognizes the use is one in behalf of which the right of eminent domain may be invoked, "and asserts the right of the State to regulate and control "the sale, rental and distribution of the same."

People vs. Stevens, 62 Cal. 209.

McCreary vs. Beaudy, 67 Cal. 120.

We conclude that, while plaintiff's waters are not public property, yet, as the plaintiff, as the successor of the Eastmans, and owner of the water works, has accepted the properties and business, it did so under the same obligations that rested upon the Eastmans, and that, while they were operating under the franchise of supplying water to the inhabitants of the city, they and their property were, so long as they did this collecting rates therefor, carrying on a business and franchise in which the public had an interest, and which were subject to State control, so far as regulating rates to be charged and prescribing the method by which the maximum rates should

be fixed, and that while the Legislature has so far failed to prescribe such method yet, still, this collecting of rates is the exercise of a franchise, and must be done under the Constitution, and as law and custom in such cases ordain; which, we think, is that they may sell and dispose of waters to their customers upon agreed rates, which shall be uniform, without distinction of person, and which require them to furnish every person on demand, and prohibits them from extorting unreasonable rates and subject to legislative control as to rates.

Souther vs. San Diego Flume Co., 112 Fed. 228.

This case deals with appropriated waters and holds that an appropriator of water for sale, rental or distribution may make contracts with customers, for the furnishing of water, and for the compensation to be paid therefor, and that the rights of the parties are governed by the contract.

IN CONCLUSION.

The record shows the nature and the ownership of the waters in question, shows property and property right relating to the use of streets, for pipes, for furnishing water to the inhabitants of the city, in the Eastmans; shows that the immediate predecessor of plaintiff in the ownership and operation of the water works was the successor in interest therein of the Eastmans, and that, for about ten years, it had owned and operated the same, under the grant to the Eastmans; shows that all parties up to 1900 interpreted the grant as we now interpret it, and as it is admitted to have been while in the hands of the Eastmans, and would be in the hands of any

individuals, and as a like grant is treated in the hands of Mr. Sonna, plaintiff's competitor in said business; shows the former custom, prior to 1897, regarding street sprinkling, was for the owners of abutting property to, at their own expense, provide for the sprinkling of their streets, and furnish the water therefor; shows that in 1897, the Legislature of Idaho, by an amendment to the city charter, placed the power and regulation to have and control street sprinkling in the city, in the Mayor and Common Council, but provided that it should be done at the cost of the owners of lots abutting on streets sprinkled; shows that after the passage of said amendatory act, the city made three several yearly contracts, for the years 1897, 1898 and 1899, for water for street sprinkling with the water company, and that it assessed the cost of the same to such abutting owners, and under the provisions of said act collected it, and paid it over to the water company; shows that the water company, in order that it might be able thus to supply the city with such water, and do so with convenience to the city in the taking of the same, was, by said contract with the city, and by the necessities of the case, obliged to expend, and did expend, the sum of over twenty thousand dollars, which it would not otherwise have been obliged to expend; and shows that the company has not and never had any special right or exclusive privilege and never enjoyed any monopoly, or any virtual monopoly; and shows that over one-fourth of the waters so taken for street sprinkling was taken for and used upon streets of the city where the said water company does not, and did not, furnish any water to the inhabitants thereof, and where its competitor does; and it appears that after the trouble arose between the city and the water company, because the city refused to pay or to

promise to pay for water to be used for street sprinkling in the year 1900, and the company refused to furnish it otherwise, that, then the city attempted to bring the water company under the obligations of section 2711, by, unknown to the company, passing an ordinance numbered 304 (page 74), pretending to grant to the water company the franchise and privileges mentioned in sections 2710 and 2712, and in said ordinance demanding that the company (p. 75) "furnish, free "of charge, sufficient water * * * for sprinkling of the "streets in said Boise City," and that, immediately after the passage of the ordinance, the water company served notice on the city that it would not accept the ordinance, or the grant and franchise it pretended to give, and that it considered the same void and of no effect, and that it did not need such pretended grants, and that it refused to furnish the water for such street sprinkling; that, thereupon, the city took the water against the orders and protests of the water company by turning the valves belonging to the water works, and by erecting stand pipes connected with the fire hydrants, which, under contracts for furnishing water for fire purposes alone, had been connected with the main pipes of the water works, and that the city claimed the right to so do in order to obtain free water for street sprinkling purposes, and did it, by and under its power and authority as a city, and, as defendant avers in its answer, by the exercise of its "governmental authority " * * * over the streets of said city * * * and "under its police power." Defendant (p. 67) admits that it "maintained and enforced the provisions of said ordinance "number 304" by denying that it did so "wrongfully"; admits that it "compelled plaintiff to furnish water for street "sprinkling," by denying that it did this "wrongfully"; in

short, nearly every material allegation of the complaint is admitted, either by an evasive denial, or otherwise—thus, the taking of the waters in the several specified amounts, is admitted, but that it was "wrongful" is denied. The value of the several items of water taken is admitted, but defendant denies that the water company was damaged thereby. The admissions and the testimony given, effect that every material allegation of the complaint is either admitted or proven—so that the question was, and is, "Can defendant justify each "and every taking set forth in the complaint, on the ground "that the obligations of section 2711 were upon the compa-"nies, and that these obligations covered each and every such "taking?"

Defendant takes the ground, in its answer, that, prior to 1900, when said rejected ordinance, number 304, was passed, the corporate predecessor of plaintiff had no right to occupy the streets with its water pipes—no right to furnish water to the inhabitants of the city, and no right to collect rates for water furnished. We think we have shown otherwise; but suppose this was admitted, would it follow that such want of any grant, contract or franchise from the city would give the defendant our property—give it the right, by its claimed "gov-"ernmental power," to help itself to this property? On the other hand, would not such fact, itself, only show the more clearly that defendant must not take, and has no right to demand, free water for any purpose? Defendant, in its answer, in effect says: "The water company must furnish this free "water because of its corporate nature, notwithstanding it "never had right, or power, or privileges, in or from the city, "until the city, in 1900, forced it to come under said rejected "and repudiated ordinance, No. 304." That is, the water

company must do everything, because it has nothing—all duties, but no powers.

Defendant, by its answer and by its acts, has taken the position that it can not only enforce the free water demand of ordinance No. 304, by its governmental and police powers, exercised in the taking of the water of the company from its pipes against its will, but, also, that it can force the company to accept the ordinance and its pretended grants and franchises, against the will, and the declared will, of the company. We find the water company in 1900 operating under a grant and franchise, given to the Eastmans, and sold to it, and after such operation for ten years, during all of which time it was dealing with the city as such water company, and contracting with it, year after year, and contracting with it to make improvement, and to go to much extra expense for the city's accommodation, and for the accommodation of its inhabitants, and then, after all this, and more, the city takes the position that the company must either cease to operate at all, or, if it does operate, it is under the necessity of doing so under said ordinance, 304, which we declare pretends to give what the company already had, in order that the city might demand what it had not, and had no right to have—the private property of the water company. Is it possible that defendant can make such efficient use of the lesson it was taught by the Supreme Court, 39 Pac. 563, where it is told, in effect, that unless the water company corporation is operating under grant obtained by a corporation under section 2710, that there is no duty on it to furnish free water or any water? We think not. It should see in that lesson that corporate existence as a water company alone does not necessarily place plaintiff under the obligations of section 2711.

And we respectfully urge that, as the taking, and the value of the property is admitted, and the manner thereof, and, as the nature thereof is shown to be strictly private property, that we were entitled to ask the jury for damages equal to the values of the properties so taken, and on the ground that the taking was wrongful, and unauthorized by law.

Respectfully sumbitted,

SELDEN B. KINGSBURY,

Of Counsel for Plaintiff.